No. 81809-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LUMMI INDIAN NATION; MAKAH INDIAN TRIBE; QUINAULT INDIAN NATION; SQUAXIN ISLAND INDIAN TRIBE; SUQUAMISH TRIBE, and the TULALIP TRIBES, federally recognized Indian tribes; JOAN BURLINGAME, an individual; LEE BERNHEISEL, an individual; SCOTT CORNELIUS, an individual; PETER KNUTSON, an individual; PUGET SOUND HARVESTERS; WASHINGTON ENVIRONMENTAL COUNCIL; SIERRA CLUB; and THE CENTER FOR ENVIRONMENTAL LAW AND POLICY,
Respondents/Cross-Appellants,

v.

STATE OF WASHINGTON; CHRISTINE GREGOIRE, Governor of the State of Washington; WASHINGTON STATE DEPARTMENT OF ECOLOGY; JAY MANNING, Director of the Washington Department of Ecology; WASHINGTON STATE DEPARTMENT OF HEALTH; and MARY SELECKY, Secretary of Health for the State of Washington,
Appellants/Cross-Respondents, and

WASHINGTON WATER UTILITIES COUNCIL, CASCADE WATER ALLIANCE, and WASHINGTON STATE UNIVERSITY,
Appellants/Cross-Respondents

APPELLANT/CROSS-RESPONDENT WASHINGTON STATE UNIVERSITY'S OPENING BRIEF

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I. INTRODUCTION

In 2003, the Washington State Legislature enacted the municipal water act of 2003, Second Engrossed Second Substitute House Bill 1338 ("municipal law" or "Act"). The Act was intended to provide more certainty and flexibility in the use of municipal water supply. Respondents challenged several sections of the law in King County Superior Court. Specifically for purposes of this case, Respondents alleged that two definitions under the law--that of "municipal water supplier" and that of "municipal water supply purposes"--violate the separation of powers doctrine and are facially unconstitutional because they violate substantive due process. Respondents brought the same challenges regarding a provision that gives guidance to Ecology regarding the status of water right certificates that include inchoate water--water that has not yet been put to beneficial use.

The superior court agreed that the challenged sections violate the separation of powers doctrine. The trial court based its decision on the fact that the sections apply retroactively and concluded that in amending the statute the legislature attempted to overrule the court's decision in *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241

(1998).[1] The trial court declined, however, to rule on the substantive due process issues.

WSU appeals the trial court's Summary Judgment Order. WSU also requests that this court rule that the challenged sections of the Act do not violate the constitutional right to substantive due process. In passing the Act, the Washington State Legislature recognized nothing more than what the court in *Theodoratus* held in regard to development of water rights. The legislature also provided guidance to Ecology by clarifying that water rights are in good standing to the extent the water right is being developed with due diligence.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in ruling that RCW 90.03.015(3) and (4) violate the separation of powers under the Washington State Constitution. Summary Judgment Order, ¶ 3.a.

2. The trial court erred in ruling that RCW 90.03.330(3) violates the separation of powers under the Washington State Constitution. Summary Judgment Order, ¶¶ 3.b-c.

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[1] Order Granting in Part and Denying in Part Plaintiffs' Motions for Summary Judgment; Granting in Part and Denying in Part Defendants' Motions for Summary Judgment, entered June 11, 2008. CP at 613-618. This Order will be referred to as the Summary Judgment Order and is attached hereto as Appendix A.

3. The trial court erred in failing to decide the substantive due process issues relating to RCW 90.03.015(3) and (4) and RCW 90.03.330(3), and by failing to rule that these statutory provisions do not facially violate substantive due process under the Washington State Constitution. Summary Judgment Order, ¶ 4.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In light of the Supreme Court's decision in *Ecology v. Theodoratus*:

a. Do RCW 90.03.015(3) and (4), which define the terms "municipal water supplier" and "municipal water supply purposes" violate the separation of powers doctrine?

b. Does RCW 90.03.330(3), which provides that water rights represented by water certificates issued prior to actual beneficial use are in "good standing", violate the separation of powers doctrine?

2. Do RCW 90.03.015(3) and (4) facially violate substantive due process under the Washington and United States Constitutions?

3. Does RCW 90.03.330(3) facially violate substantive due process under the Washington and United States Constitutions?

IV. STATEMENT OF THE CASE

A. Statement of Facts

In 1998 the Washington Supreme Court issued its decision in *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). In 2003, based in part on this decision and Ecology's need for clarification of the decision, the Washington Sate Legislature passed and Governor Locke signed into law the municipal water act of 2003, Second Engrossed Second Substitute House Bill 1338.

1. Theodoratus

This case arises from the state legislature's passage of the municipal law, which was adopted in part as a response to the Supreme Court decision in *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). *Theodoratus* is an important water resources case in which this court recognized the elements of the development of a water right. The case came before the court on the issue of whether the Department of Ecology has the authority to change conditions on a water right permit when Ecology approves an extension of the development schedule in the permit. The specific condition provided that "a vested water right would be determined based upon actual application of water to beneficial use, not on system capacity." *Id.* at 1244. The court stated "The primary issue in this case is whether a final certificate of water right,

i.e., a vested water right, may be issued based upon the capacity of a developer's water delivery system, or whether a vested water right may be obtained only in the amount of water actually put to beneficial use." *Id.* at 1243. In the process of reaching its decision, the court analyzed the development of water rights under the state water rights permit process.

The parties to the current case argue at length about the issues and substantive findings of the court in *Theodoratus*. One familiar with the case would recognize that this case is significant in large part because of the court's interpretation of the state statutory permit process based on the fundamental elements of western water law. The court analyzed the basic common law principles of beneficial use and perfection of a water right within the context of the statutory scheme set forth in chapter 90.03 RCW. The court found that the requirement of beneficial use effectuated the legislative intent expressed in both the surface and groundwater statutes.

Under the state process, a water right is established by acting with due diligence and applying the water to actual beneficial use within a reasonable amount of time. The water right is not perfected and does not vest until the water is applied to actual beneficial use. At the time the water right is vested the priority date of the right relates back to the date the application for water right was filed under the "relation back doctrine."

Based on these principles of Washington water law, the court in *Theodoratus* held that neither the statutes nor case law support the use of system capacity as a basis for defining beneficial use. *Theodoratus*, 135 Wn.2d at 593. Likewise system capacity may not be used as a basis for determining a water right has been perfected and issuing a water right certificate. *Id.* Any conditions on a permit that provide for the issuance of a certificate based upon system capacity are not enforceable. *Id.* at 593, 598, 600 (Ecology acted beyond its authority, or *ultra vires*, by measuring a water right based on system capacity, and a water right certificate may be issued for only that amount of water applied to beneficial use.)

The court also noted that Mr. Theodoratus was a private developer and his development plan was finite. Mr. Theodoratus, the court stated, was not a "municipality", and the court declined to address "issues concerning municipal water suppliers in the context of this case." *Id.* at 594. The court recognized that under statute there are differences between municipal and other water uses, citing RCW 90.03.260 and RCW 90.14.140(2)(d).[2] RCW 90.03.260 sets forth the requirements for an

[2] While the court in Theodoratus declined to address the municipalities' issues, it did cite to the Governor's veto of a section of a 1997 bill passed by the legislature that would have created vested rights for public water systems based upon system capacity. The court stated that this veto is evidence that the system capacity is not the measure of a water right under current statute. *Theodoratus*, at 594. This language by the court does not, however, support Respondents' case because *Theodoratus* did not hold that water

application to appropriate water and RCW 90.14.140(2)(d) provides for an exemption from relinquishment if the water is claimed for municipal water supply purposes.

In the current action, it is important to recognize that the court did not invalidate any water rights that were represented by system capacity certificates instead of actual beneficial use. Nor did the court find that premature issuance by DOE of certificates changed the right to the authorized use of water. On the contrary, the court recognized that inchoate rights exist to the extent appropriators continue to diligently and with good faith grow into their water rights and apply the water to beneficial use. *Id.* at 591-92. Significantly, the *Theodoratus* decision left an unanswered question: How should the water rights represented by certificates that were issued with unused or inchoate water be defined or characterized?

2. The Municipal Act

In 2003, the Washington State Legislature passed the municipal water act of 2003, Second Engrossed Second Substitute House Bill 1338. The legislature passed this law in part to address the question described above: How should Ecology treat certificates that include inchoate water?

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rights that had system capacity certificates are now invalid, but rather they remain in good standing to the extent they are developed with due diligence. *See id.* at 591-592.

Specifically relevant to this appeal are the sections in the Act that defines municipal water supplier and municipal water supply purposes, RCW 90.03.015(3) and (4), and the section that provides that certificates of inchoate water are rights in "good standing," RCW 90.03.330(3).

RCW 90.03.015(3) defines a "municipal water supplier" as an entity that supplies water for municipal water supply purposes. RCW 90.03.015(4) defines a "municipal water supply purposes" to include a beneficial use of water for residential purposes for a specified number of connections or people, for governmental or governmental proprietary purposes by identified public entities or indirectly for the purposes described.

RCW 90.03.330(3) provides that a water right certificate for municipal water supply purposes (as defined above), which was based upon system capacity as opposed to beneficial use, and issued prior to September 9, 2003, "is a right in good standing."

These sections are fully quoted in the Argument below.

3. WSU's Interest

WSU interest in this case provides the court with a unique perspective on the application of the municipal law. WSU provides potable water to thousands of people within its main campus located in the City of Pullman, Washington. CP at 1189-91, 1193-94, 1196-98.

Respondent Burlingame cited to WSU's Pullman campus as an example of a water purveyor that would allegedly unlawfully benefit under the municipal law. CP at 4 ¶ 10. While WSU is itself not an incorporated city or town, WSU operates the public water system serving its main campus which is located within the city limits of the City of Pullman. CP at 1189-91. Respondents ignore the *purposes* for which water is supplied (which would be the same regardless of whether WSU or the City of Pullman supplies water to the campus), and focus exclusively on the identity and status of the water supplier. Respondents have attacked the validity of WSU's water rights for the operation of its Pullman campus and sought to undermine WSU's ability to provide water for these municipal water supply purposes.

WSU holds several water rights furnishing public water supply to its Pullman campus; these water rights were established at various times over many years beginning in the 1930's. CP at 1196-98. Two of WSU's water rights predate the groundwater code, chapter 90.44 RCW, and are evidenced by water right claims filed in 1974 claiming water for municipal supply purposes. *Id.* Three of WSU's water rights are represented by water right certificates, the most recent of which was issued in 1978 for municipal supply. *Id.* Consistent with its longstanding historical practices, the State issued these water right certificates based on

system capacity; as such, WSU's certificates represent both a quantity of water actually applied to beneficial use and a quantity of water available as "inchoate" or unperfected water for the future growth and development of the University. Finally, WSU holds one water right permit, issued in 1989 for municipal supply. *Id.* All these water rights are used interchangeably to supply the Pullman campus water system. *See* CP at 1196-97. WSU has consistently claimed its water rights for municipal water supply purposes, irrespective of the passage of the municipal law. Thus, WSU is in a unique position before this Court as a municipal water rights holder and the holder of water right certificates issued based on system capacity rather than actual beneficial use.

As discussed below, the Supreme Court in *Department of Ecology v. Theodoratus* held that Ecology's prior practice of issuing certificates for inchoate water based on system capacity were not issued within the authorized process described in the statutory permit process. Because the court found that the act of issuing these premature certificates was *ultra vires,* the description of WSU's inchoate water rights was not clear—if the water rights cannot be represented by a certificate, and they were not represented by a permit, the rights existed without a representative or recognized document. As discussed below, the Act has now recognized

that the water rights represented by these certificates may remain in good standing within the statutory framework of the water code.

WSU's interest is also unique because, since the enactment of the municipal law, WSU applied to Ecology to change its water rights to consolidate the authorized points of withdrawal to enable the rights to be used more efficiently. CP at 1197, 1212-67. These applications were filed with Ecology in October 2004. *Id.* Pursuant to the law regarding applications for change, the applications were published, comment was taken and Ecology considered the validity of the water rights, the University's reasonable diligence, and the need for continued use of water for future growth of the Pullman campus. *Id.*

Third parties, including Respondent Scott Cornelius, challenged the Ecology decisions by appeal to the Pollution Control Hearings Board ("PCHB") under RCW chapter 43.21B.[3] *See Cornelius v. Dep't of Ecology and WSU,* PCHB No. 06-099, Order on Summary Judgment (As Amended on Reconsideration), at 26 (Jan. 18, 2008) (Appendix B)

[3] Mr. Scott Cornelius is an Appellant/Petitioner in the PCHB case and a Respondent/Cross Appellant in this case. In the case before the PCHB, Mr. Cornelius seeks judicial review of many of the same sections of the municipal water law that he also seeks review of in this current case, including challenges to the constitutionality of the municipal law as applied to WSU. *See Cornelius* PCHB Order (App. B). Cornelius and two other parties have now appealed the *Cornelius* PCHB Order to the Superior Court for Whitman County and Court of Appeals Division III for discretionary direct review. Whitman County Superior Court Cause No. 08-2-00181-2 (filed July 3, 2008); Court of Appeals Case No. 273962-III (filed Sept. 9, 2008).

(referred to herein as "*Cornelius* PCHB Order"). The PCHB affirmed the water right changes. *Id.*

Based on these interests and Respondents' allegations, WSU sought and was granted status as an intervenor in this case.

B. Proceedings Below

WSU adopts and incorporates herein the State's recitation of the Procedure Below in the Opening Brief of Appellant/Cross Respondent State of Washington at 7-12.

V. SUMMARY OF ARGUMENT

1. The legislature enacted the municipal law in part to respond to Ecology's need for guidance. Ecology had historically issued water right certificates based upon system capacity rather than the amount of water put to beneficial use. This court in *Theodoratus* held that system capacity may not be used as a basis for determining that a water right has been perfected and a certificate should issue. *Theodoratus,* 135 Wn.2d at 593. Significantly, the court did not invalidate any water right certificates, including those issued based on system capacity. Ecology was left without direction regarding how to treat previously issued certificates that included some inchoate water--water not yet put to beneficial use.

The municipal law provided direction in RCW 90.03.330(3): such certificates are rights in good standing. Because this court in its ruling in

Theodoratus had not changed any fundamental aspects of water law, the inchoate portions of these certificates must be perfected in the same manner as any other water right--by proceeding with due diligence to put the water to beneficial use. The municipal law does not give rise to separation of powers issues.

2. Respondents also challenge the municipal law under substantive due process as being facially unconstitutional. To succeed in such a challenge, Respondents must prove that there is no set of circumstances under which the statute may be constitutionally applied. WSU's experience in having its water rights challenged under the municipal law alone defeats Respondents' facial challenge.

VI. ARGUMENT

A. Standard of Review and Burden of Proof

A challenge to the constitutionality of a statute is a question of law reviewed *de novo*. *Amunrud v. State of Washington, Dep't of Soc. and Health Servs.*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). The standard of review is whether the statute's language violates the Constitution, not whether the statute would be unconstitutional "as applied" to the facts of a particular case. *Tunstall v. Bergeson*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000). The court's duty "is not to be exercised in reference to

hypothetical cases thus imagined." *United States v. Raines*, 362 U.S. 17, 22, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960).

Where the constitutionality of a statute is challenged, the statute is presumed constitutional. *Tunstall*, 141 Wn.2d at 220. The burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt. *Id.* The practical effect of holding a statute unconstitutional on its face is to render it "utterly inoperative." *Id.* at 221 (quoting *In re Detention of Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1999)).

B. The Municipal Water Act Does Not Violate the Separation of Powers Doctrine

The superior court concluded that through enactment of RCW 90.03.015(3), (4), and .330(3) the Legislature "attempt[ed] . . . to overrule interpretations of the Water Code" by this Court in *Theodoratus* in violation of the separation of powers doctrine. Summary Judgment Order, ¶¶ 3.a-b. WSU believes this was an erroneous interpretation of the law.

1. The separation of powers doctrine is meant to ensure sufficient checks and balances to preserve each branch of government's core functions.

The separation of powers doctrine is meant to protect the independence and integrity of the three branches of government. *See City*

of Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006). The doctrine is not to be used as a sword to strike down acts of a governmental branch as Respondents' desire. In order to have a functioning government it is clear the doctrine is not to be applied in a manner that prohibits the legislature from taking action on a matter that was already addressed by the courts. *See City of Spokane v. Spokane County*, 158 Wn.2d 661, 678-679, 156 P.3d 893 (2006).

The test of whether an action by the legislature violates the separation of powers doctrine is whether a statute enacted by the legislature acts to overrule a decision of the court. *Cf. City of Spokane*, 158 Wn.2d at 678-679. The question in this case is whether the enactment of the challenged sections of the municipal law violated the independence and integrity of the judiciary based on the court's ruling in *Theodoratus*. The answer is no.

The Respondents argue that the separation of powers is invoked because in enacting the municipal law the legislature has validated water rights that were otherwise invalid. This argument misinterprets the *Theodoratus* case and the municipal law.

2. RCW 90.03.330(3) does not overrule the Court's decision in *Theodoratus.*

The superior court adopted the Respondents' position regarding RCW 90.03.330(3) that the legislation violated the separation of powers doctrine because it validated water rights that were otherwise invalid. WSU believes the superior court is in error.

The statutory provision at issue addresses the status of water right certificates issued prior to September 9, 2003 based on system capacity rather than beneficial use. Specifically the subsection states:

> (3) This subsection applies to the water right represented by a water right certificate issued prior to September 9, 2003, for municipal water supply purposes as defined in RCW 90.03.015 where the certificate was issued based on an administrative policy for issuing such certificates once works for diverting or withdrawing and distributing water for municipal supply purposes were constructed rather than after the water had been placed to actual beneficial use. Such a water right is a right in good standing.

RCW 90.03.330(3).

The question before the Court can be distilled down to what the legislature meant by providing that certificates based on system capacity rather than beneficial use are to be considered rights "in good standing." If, as Respondents argue, the legislature meant that such certificates were to be considered perfected water rights, then the statute overrules *Theodoratus* and violates the separation of powers doctrine. If, however,

as we believe, the legislature meant the water rights were not yet perfected and remain subject to the requirement of due diligence, then the statute does not overrule *Theodoratus* and is fully constitutional.

There is no doubt that the *Theodoratus* decision was decided solely on the facts of the case but it still left Ecology and the legislature with the question of how to manage the water rights under certificates that Ecology had previously issued based on system capacity and prior to full beneficial use. The Court in *Theodoratus* did not invalidate such water rights—it only held that certificates issued prior to actual use were not authorized under statute. After *Theodoratus*, there was no mechanism in statute to now recognize these water rights. Ecology, which is mandated under statute to provide the legislature with revisions to the law to better administer the water code, requested legislation that would provide a statutory definition or recognition of these rights. RCW 90.54.040(3). The legislature agreed and adopted section .330(3) that now recognizes these rights, including their inchoate portions, simply as rights in good standing. The legislature created a second type of certificate.

This interpretation that rights "in good standing" are not perfected rights is consistent with the *Theodoratus* Court's understanding of that phrase. The Court quoted 1 *Wells A. Hutchins, Water Rights Laws in the*

Nineteen Western States 276 (1971) for a description of an inchoate right as:

> an incomplete appropriative right *in good standing*. It comes into being as the first step provided by law for acquiring an appropriative right is taken. It remains *in good standing* so long as the requirements of law are being fulfilled. And it matures into an appropriative right on completion of the last step provided by law.

Theodoratus, 135 Wn.2d at 596 (emphasis added).

The phrase "in good standing" in RCW 90.03.330(3) is used in the same way: to describe an inchoate right that must be developed with due diligence according to the requirements of law.

In enacting the 1917 water code, chapter 90.03 RCW, the legislature created an administrative process which provided that during the due diligence period, while the water right was inchoate, the right was represented by a piece of paper that was a "water right permit." Once the water right is diligently prosecuted under the terms of the permit, and the water is applied to the intended use, the vesting or perfection of the water right is represented by a "certificate" issued by the State. However, regardless of when a certificate issues, the substantive law dictates that the right is perfected and vests only when the water right is applied to actual beneficial use.

While the municipal law changed the definition of a certificate to include inchoate water rights, the legislature did not change the substantive law described by this court: the development of a perfected water right is subject to the requirements of due diligence and actual beneficial use. The right is in "good standing" as long as it continues to be developed with due diligence.

The application of the municipal law can be seen in the WSU case before the PCHB. In that case, which was brought by Scott Cornelius, a respondent in this case, the PCHB held that even if the right is represented by a certificate, Ecology properly determined that due diligence is required for development of the inchoate portion of the water right. *Cornelius* PCHB Order at 26 (App. B). The fact that the inchoate right was in the form of a certificate did not provide any greater rights to WSU than other ground water rights. The PCHB was guided by other Supreme Court decisions such as *R.D. Merrill. v. Pollution Control Hearings Board,* 137 Wn.2d 118, 969 P.2d 459 (1999), and *Public Utility District No. 1 of Pend Oreille v. Department of Ecology,* 146 Wn.2d 778, 51 P.3d 744 (2002). *See Cornelius* PCHB Order at 21-27 (App. B).

The Respondents wish to take the term "good standing" and interpret it to mean that the legislature validated water rights that were once invalid. While this is a possible reading of the statute, the more

reasonable interpretation is one that does not require the Court to find the law unconstitutional. *Anderson v. Morris,* 87 Wn.2d 706, 716, 558 P.2d 155 (1976) (where a statute is susceptible to more than one interpretation, the court should construe the statute to be constitutional, if at all possible). The description of a water right as being in "good standing" means that if the water right is pursued with due diligence and developed within a reasonable period of time, it remains a valid inchoate right until it vests for the quantity of water applied to beneficial use.

Section .330 of the Act answers a question left unanswered by the *Theodoratus* court in a manner consistent with Washington water law. It does not violate the separation of powers doctrine.

3. The legislative enactment of definitions in the Act does not overrule the Court's decision in *Theodoratus.*

Respondents also challenge the validity of two definitions from the Act. These sections state, in part:

> (3) "Municipal water supplier" means an entity that supplies water for municipal water supply purposes.
>
> (4) "Municipal water supply purposes" means a beneficial use of water: (a) For residential purposes through fifteen or more residential service connections or for providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year; (b) for governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district; or (c) indirectly for the purposes in (a) or (b) of this subsection through the

> delivery of treated or raw water to a public water system for such use . . .

RCW 90.03.015(3) and (4).

The legislative enactment of these definitions in and of itself did not violate or limit the decisions of the Court in *Theodoratus*. A definition has no force and effect unless and until it is applied in a manner that would be unconstitutional. There is no separation of powers issue.

WSU has always claimed to be a municipal water supplier, prior to and after the enactment of the Act. However, if this is now in dispute as argued by the Respondents, the municipal law, which undisputedly includes WSU as a municipal water supplier, does not violate the separation of powers doctrine. The determination of whether there is a violation must be based on the use of that definition in the application of other sections of the Act or previously existing statutes. As described above, the application of the definition to the section of the Act codified in RCW 90.03.330(3) does not challenge the independence of the Court in its decision in *Theodoratus*.

Before the trial court, Respondents extensively briefed and relied upon the law that exempts from relinquishment under the statutory forfeiture laws rights claimed for municipal water supply purposes. RCW 90.14.140(2)(d). As the Court in *Theodoratus* stated, the relinquishment

statute does not apply to the system capacity certificates at issue in that case; but rather only applies to water rights that have been perfected by the appropriation or actual beneficial use of water. RCW 90.14.160-.180; *see Theodoratus*, 135 Wn.2d at 594-595. The water rights represented by certificates and labeled as in "good standing" under the Act are those that were issued as inchoate water rights--not yet fully perfected by actual beneficial use. Consequently, they are not subject to the statutory relinquishment laws for the water that has not yet been used. *Id.* The definitions of municipal water suppliers and purposes, to the extent they may now include water users that were previously not municipal water suppliers, are not related to and do not impinge on the decision of the court in *Theodoratus.*

The definitions in the Act have no effect on the substantive law. An entity that is now included as a municipal water supplier may still not obtain a certificate based on system capacity. WSU's recent experience is evidence of this fact. WSU's inchoate water rights represented by certificates were recently held to be subject to these substantive laws when Ecology processed a change application. *See generally Cornelius* PCHB Order (App. B). All municipal water suppliers remain subject to the substantive law as articulated by the Court in *Theodoratus.* The definitions in the Act raise no issue of separation of powers.

The only support for Respondents' position is if they prevail on the argument that the municipal law unconstitutionally perfected the full quantity of the water rights represented by the system based certificates. Under Respondents' arguments, the definitions would act to bring in entities previously not considered municipalities and afford them perfected water rights based on system capacity. This straw person argument fails because it is simply not what the *Theodoratus* case held. As discussed above, this is not a correct or reasonable interpretation of the law. The municipal law did not, as Respondents' allege, overturn years of common law development in this state.

The Respondents cite to an Arizona case, *San Carlos Apache Tribe v. Superior Court of Arizona for the County of Maricopa,* 193 Ariz. 195, 972 P.2d 179 (1999). This case is not controlling law in this state and is not applicable to the facts in this case. However, in regard to the separation of powers, the decision is helpful.

In *San Carlos Apache,* the court addressed legislative changes to the Arizona statutes, which the legislature enacted for the purpose of affecting two large water right adjudications pending in the state courts. The legislation revised numerous statutes pertaining to the general adjudication process and to surface water rights. The court addressed both issues of due process and separation of powers.

In regard to separation of powers, the court was clear that the legislature cannot direct the court to decree certain facts or water right attributes without any opportunity for review. The court held: "The Legislature cannot dictate to the master, court, or DWR the factual conclusions that underlie decrees." *Id.* at 197, 972 P.2d at 213. The Court did however find that a statute regarding a procedural matter does not violate the separation of powers doctrine because it does not mandate a particular conclusion by the court. *Id.* at 198, 972 P.2d at 214.

Unlike the offending statutory amendments in *San Carlos,* the Act here does not change the substantive law. Rather, the Act provided a procedural definition that gave the inchoate and developing water rights a recognized documented right under the statutory process. The substantive laws articulated by the court in *Theodoratus* including the doctrines of beneficial use, due diligence, perfection, relation back and vesting did not change under the Act.

C. RCW 90.03.330(3) Does Not Violate Substantive Due Process

Respondents maintain that RCW 90.03.330(3) violates substantive due process because it impairs vested property rights. Respondents' argument depends upon an interpretation that subsection .330(3) recognizes certificates based upon system capacity as perfected water rights. As discussed above this is not a correct interpretation of the

statute. The Act does not exempt the water rights represented by these system capacity certificates from the requirements of due diligence. The law remains that a water right must be applied to beneficial use with reasonable diligence and the right will not vest with the priority date of the original filing of an application until the right is perfected by application of the water to beneficial use. RCW 90.03.340.

WSU adopts and incorporates the argument of the State's Opening Brief on this issue, Sections V.C.1 and V.C.3, pages 35-36, 45-48. Application of subsection .330(3) will not impair vested water rights and will not violate substantive due process.

D. The Definitions of "Municipal Water Supplier" and "Municipal Water Supply Purposes" Found in RCW 90.03.015(3)-(4) Do Not Facially Violate Substantive Due Process

WSU adopts and incorporates the arguments of the State in the State's Opening Brief, Sections V.C.1 and V.C.3, pages 35-45. WSU submits the following additional argument.

Respondents want the Court to believe that the Act facially violates substantive due process because it now defines water rights as being for municipal water supply purposes that were not authorized for municipal water supply purposes in the past. In order to prevail on a facial challenge, Respondents must prove that there are no circumstances under

which the retroactive application of the statute would be valid. *United States v. Salerno,* 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); *City of Redmond v. Moore,* 151 Wn.2d 664, 669, 91 P.3d 875 (2004). Respondents cannot satisfy their burden.

For example, Respondents claim that the definition now includes entities as municipal water suppliers that would not have been characterized as municipal water users prior to the Act. As a result, Respondents argue, these entities' water rights are now protected from relinquishment where they were not prior to the Act. Respondents allege that this may injure junior water right holders. However, if any of these entities now defined as municipal water suppliers have water rights they have continuously beneficially used, it makes no difference that they are now exempt from retroactive relinquishment actions. Respondents cannot meet their burden.

WSU is uniquely positioned to argue that the facial challenge is misplaced. Respondents' grievances are highly fact-dependent and cannot meet the stringent standards for a facial challenge. They are best left to be asserted in as-applied challenges. In the case of WSU's water rights, Respondent Cornelius has an "as applied" challenge with an adequate remedy that he is already pursuing. *See generally Cornelius* PCHB Order

(App. B). This fact provides ample evidence that Respondents' facial constitutional challenge is improper and should be denied.

Respondents again rely upon the Arizona case, *San Carlos Apache,* in their assertion that the definitions in the Act violate substantive due process. In *San Carlos Apache*, the court addressed issues of retroactive application of the statutes and applied the following: "the Legislature cannot revive rights that have been lost or terminated under the law as it existed at the time of the event and that have vested in otherwise junior appropriators." 193 Ariz. at 189, 972 P.2d at 205 (citations omitted). Thus the court invalidated statutory provisions that would act to revive lost water rights. The court's concern was that when the right had been lost or terminated that the water had vested in a junior appropriator and could not now be taken away. Therefore, the statute impaired the vested water rights of junior appropriators.

The Act, especially as it pertains to WSU, does not act in the same way as the Arizona statutes. Under the Act, if an entity is now considered to be a municipal water supplier, its rights are not subject to relinquishment. The statute does not provide that an entity whose water right was previously relinquished and therefore had vested in a junior water right holder may now claim that its water right should not have been

relinquished and should somehow be revived. *San Carlos Apache* is not applicable and does not support Respondents' argument.

Significantly, WSU as well as any water right holder in its position may assert the "claim for municipal water supply purposes" as an exemption to the relinquishment laws, irrespective of the Act. The Act did not change the statutory relinquishment laws, including the exemptions under RCW 90.14.140. By analogy, junior water right holders have no claim of unconstitutional impairment based on implementation of the other legislatively adopted exemptions from relinquishment. The exemptions were adopted in a series of statutory amendments.[4] Respondents are not arguing, nor can they, that the other exemptions are an unconstitutional impairment of their rights. *See R.D. Merrill v. Pollution Control Hearings Board,* 137 Wn.2d at 471, in which the court recognized the exemption from relinquishment based on the non-use of water that is "claimed for a determined future development," or is the result of "legal proceedings." RCW 90.14.140(2)(c) and .140(1)(d). Just as before *Theodoratus* and enactment of the municipal law, a junior water right will not suffer impairment from the holder of a senior perfected

[4] The statute was originally enacted in 1967, amended in 1987, as well as in subsequent years. *See, e.g.,* the statutory exemption for nonuse of water that occurs due to "federal lease or state agency leases or options to purchase water rights which preclude the use of the right by the owner of the right," RCW 90.14.140(1)(e) which was adopted in 1998;

water right that has the right to claim the use of its water for municipal water supply purposes as an exemption of relinquishment.

The statutory relinquishment law was passed under the police power of the state and can be as easily revoked by the legislature. As explained in the private property interests that the state has created in this State's Opening Brief, Section V.C, pages 12-14, public resource may be affected by the legislature's authority to pass new laws that define the nature of the right, or the "bundle of sticks" one has in a water right, to address the ever-changing and evolving policies of water use and regulation. The definitions in RCW 90.03.015(3), (4) do not make the statute facially unconstitutional and do not violate substantive due process.

VII. CONCLUSION

WSU respectfully request this Court reverse the trial court and rule that the definitions in the municipal law at RCW 90.03.015(3) and (4) do not violate the separation of powers and are facially constitutional under the right to due process under the Washington State Constitution. WSU also requests the court rule that RCW 90.03.330(3) does not violate the

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the statutory exemption for "the reduced use of water resulting from crop rotation," RCW 90.14.140(1)(k), which was adopted in 2001.

separation of powers and is facially constitutional under the right to due process under the Washington State Constitution.

Respectfully submitted this 24th day of October 2008.

CASCADIA LAW GROUP PLLC

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Attorneys for Washington State University

CERTIFICATE OF SERVICE

I hereby certify that I have on this 24th day of October, 2008, served a copy of the foregoing **Appellant Washington State University's Opening Brief**, on the following parties, by email and by U.S. mail, postage prepaid:

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DATED this 24th day of October 2008.

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APPENDIX A

JUDGE JIM ROGERS

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

LUMMI INDIAN NATION, MAKAH INDIAN TRIBE, QUILEUTE INDIAN TRIBE, QUINAULT INDIAN NATION, SQUAXIN ISLAND INDIAN TRIBE, SUQUAMISH INDIAN TRIBE, and the TULALIP TRIBES, federally recognized Indian tribes, Plaintiffs, v. STATE OF WASHINGTON; CHRISTINE GREGOIRE, Governor of the State of Washington; WASHINGTON DEPARTMENT OF ECOLOGY; JAY MANNING, Director of the Washington Department of Ecology; WASHINGTON DEPARTMENT OF HEALTH; and MARY SELECKY, Secretary of Health for the State of Washington, Defendants.	NO. 06-2-40103-4 SEA ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT; GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

JOAN BURLINGAME, an individual; LEE BERNHEISEL, an individual, SCOTT CORNELIUS, an individual; PETER KNUTSON, an individual; PUGET SOUND HARVESTERS; WASHINGTON ENVIRONMENTAL COUNCIL; SIERRA CLUB; and THE CENTER FOR ENVIRONMENTAL LAW AND POLICY,

Plaintiffs,

vs.

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF ECOLOGY, and WASHINGTON STATE DEPARTMENT OF HEALTH,

Defendants,

and

WASHINGTON WATER UTILITIES COUNCIL, CASCADE WATER ALLIANCE and WASHINGTON STATE UNIVERSITY,

Defendant-Intervenors.

NO. 06-2-28667-7 SEA

This matter came before the Court on motions for summary judgment filed by all parties. The Court heard the oral arguments of counsel and considered the pleadings filed in this action and the following evidence:

1. Burlingame Plaintiffs' Motion for Summary Judgment.

2. The declarations of Joan Burlingame, Scott Cornelius, Joan Crooks, Shaun Goho, Peter Knutson, Michael O'Brien, and John Osborn, and the exhibits attached thereto.

3. Plaintiff Tribes' Motion for Summary Judgment.

4. The declarations of Joel Massman, Terry R. Williams, Leonard Forsman, Merle Jefferson, John B. Arum, and Crystal Sampson, and the exhibits attached thereto.

5. Defendant State of Washington's Motion for Summary Judgment.

6. The declarations of Ken Slattery and Michael Dexel and the exhibits attached thereto.

7. Defendant-Intervenor Washington Water Utilities Council's Motion for Summary Judgment.

8. The declarations of Tadas Kisielius, Jim, Miller, Thomas D. Mortimer, John C. Kirner, Nancy Davidson, Michael Ireland, John Kounts, and Jeffrey N. Johnson, and the exhibits attached thereto.

9. Defendant-Intervenor Cascade Water Alliance's Motion for Summary Judgment.

10. Burlingame Plaintiffs' Response to Defendants' Motions for Summary Judgment.

11. The declarations of Shaun Goho and Lee Bernheisel and the exhibits attached thereto.

12. Plaintiff Tribes' Response to Defendants and Defendant-Intervenors' Motions for Summary Judgment.

13. The Second Declaration of John B. Arum and the exhibits attached thereto.

14. Defendant State of Washington's Memorandum in Opposition to Burlingame Plaintiffs' Motion for Summary Judgment.

15. Defendant State of Washington's Memorandum in Opposition to Plaintiff Tribes' Motion for Summary Judgment.

16. The declarations of Alan M. Reichman, Ken Slattery, and Jay Cook, and the exhibits attached thereto.

17. Defendant State of Washington's Memorandum in Response to WWUC's Motion for Summary Judgment.

18. Defendant-Intervenor Washington Water Utilities Council's Response to Plaintiffs' Motions for Summary Judgment.

19. The declarations of Tadas Kisielius, Joseph Becker, Bradley D. Lake, Robert D. Hunter, and James W. Miller, and the exhibits attached thereto.

20. Defendant-Intervenor Cascade Water Alliance's Response to Plaintiffs' Motions for Summary Judgment.

21. Defendant-Intervenor Washington State University's Response to Plaintiffs' Motions for Summary Judgment.

22. Burlingame Plaintiffs' Reply in Support of Motion for Summary Judgment.

23. Plaintiff Tribes' Reply in Support of Motion for Summary Judgment.

24. State's Memorandum in Rebuttal to Burlingame Plaintiffs' Response to State's Motion for Summary Judgment.

25. State's Memorandum in Rebuttal to Plaintiff Tribes' Response to State's Motion for Summary Judgment.

26. Defendant-Intervenor Washington Water Utility Council's Reply to Plaintiff Tribes' and Burlingame Plaintiffs' Memoranda in Response To WWUC's Motion for Summary Judgment.

27. Defendant-Intervenor Washington Water Utilities Council's Reply to State's Memorandum in Response to WWUC's Motion for Summary Judgment.

28. The declarations of Bill Clarke and Tom McDonald and the exhibits attached thereto.

29. Defendant-Intervenor Cascade Water Alliance's Reply to Plaintiffs' Responses to Motions for Summary Judgment.

30. Defendant State of Washington's Memorandum in Response to Plaintiffs' New Claims Pertaining to RCW 90.03.330(2).

31. Defendant-Intervenor Washington Water Utilities Council's Memorandum in Response to Plaintiffs' New Claim Regarding RCW 90.03.330(2).

32. Defendant-Intervenor Cascade Water Alliance's Response to Plaintiffs' New Claims Pertaining to RCW 90.03.330(2)

33. Burlingame Plaintiffs' Reply as to Procedural Due Process Challenge to RCW 90.03.330(2).

34. Plaintiff Tribes' Reply in Support of Motion for Summary Judgment re: RCW 90.03.330(2).

The Court also considered the argument of counsel, and hereby incorporates its oral ruling made on June 11, 2008.

THEREFORE, IT IS HEREBY ORDERED:

1. Plaintiffs Joan Burlingame, Lee Bernheisel, Scott Cornelius, Peter Knutson, Puget Sound Harvesters, Washington Environmental Council, and the Center for Environmental Law and Policy (collectively the "Burlingame Plaintiffs") and plaintiffs Lummi Nation, Makah Indian Tribe, Quinault Indian Nation, Squaxin Island Indian Tribe, Suquamish Tribe and the Tulalip Tribes (collectively the "Tribes") have standing as taxpayers to bring this action;

2. The Motion in Limine of Washington Water Utilities Council is Denied;

3. The Motions of the Plaintiffs are GRANTED IN PART and the Motions of the Defendants and Defendant -Intervenors are DENIED IN PART as follows:

a. RCW 90.03.015(3) and (4) violate the separation of powers under the state constitution because they have retroactive effect and attempt to overrule an interpretation of the Water Code in Department of Ecology v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

b. RCW 90.03.330(3) violates the separation of powers under the state constitution because it has retroactive effect and attempts to overrule an interpretation of the Water Code in Department of Ecology v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

c. Alternatively, even if one were to accept the State's interpretation of the statute that it addresses only valid inchoate water rights (or rights "in good standing") (which this Court does not), then RCW 90.03.330(3) violates the separation of powers under the state constitution because it purports to make a legislative determination of adjudicative facts concerning the

"good standing" of particular water rights.

4. Having found certain provisions unconstitutional, the Court declines to decide the substantive due process claims related to RCW 09.03.300(3), 90.03.015(3) and (4) and RCW 90.03.560;

5. The Motions of the Defendants and Defendant -Intervenors are GRANTED IN PART and the Motions of the Plaintiffs are DENIED IN PART as follows:

a. RCW 90.03.260(4) and (5) do not facially violate substantive due process under the state and federal constitutions.

b. RCW 90.03.386(2), does not facially violate substantive due process under the state and federal constitutions.

c. RCW 90.03.386(2), does not facially violate procedural due process under the state and federal constitutions.

d. RCW 90.03.260(4) and (5), do not facially violate procedural due process under the state and federal constitutions.

e. RCW 90.03.330(2), does not facially violate procedural due process under the state and federal constitutions.

June 11, 2008

THE HONORABLE JIM ROGERS

APPENDIX B

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

SCOTT CORNELIUS, PALOUSE WATER CONSERVATION NETWORK, and SIERRA CLUB PALOUSE GROUP, Appellants, v. WASHINGTON DEPARTMENT OF ECOLOGY and WASHINGTON STATE UNIVERSITY, Respondents.	PCHB No. 06-099 **ORDER ON SUMMARY JUDGMENT** ***(AS AMENDED ON RECONSIDERATION)***[1]

This matter comes before the Pollution Control Hearings Board (Board) as part of the above-captioned appeal contesting the approval by the Department of Ecology (Ecology) of changes to six groundwater rights at Washington State University (WSU). This order addresses all of the parties' motions and cross motions for partial summary judgment, which collectively involves all of the legal issues identified by the parties in this appeal.

The parties submitted these motions to the Board for its consideration on the written record. The Board requested oral argument, which was held on October 29, 2007, at the Board's offices in Lacey, Washington. Attorneys Rachael Paschal Osborn, M. Patrick Williams of the Center for Environmental Law & Policy, and Harold Magistrale, represented Appellants Scott Cornelius, *et. al.* on the briefs, and Ms. Osborn and Mr. Williams presented Appellants' oral argument. Alan M. Reichman and Sarah M. Bendersky, Assistant Attorneys General, represented Respondent Ecology on the briefs and at oral argument. Respondent WSU was

[1] By the Board's Order on Reconsideration, issued January 18, 2008.

represented by Sarah E. Mack and James A. Tupper, of Tupper Mack Brower, PLLC, and Frank M. Hruban, Assistant Attorney General, on the briefs, and Mr. Hruban and Ms. Mack presented oral argument on behalf of WSU.

Board members Andrea McNamara Doyle, Presiding, Kathleen D. Mix, Chair, and William H. Lynch, Member, heard oral arguments, and reviewed and considered the pleadings and record pertinent to the motion in this case, including the following:

1. Appellants' Motion for Partial Summary Judgment on the Issues of Enlargement (Issue No. 7), Relinquishment (Issue No. 8D), and Abandonment (Issue No. 9B).
2. Declaration of Rachael Osborn, dated August 27, 2007 (***hereinafter "First Osborn Decl."***), with attachments 1-10.
3. Appellants' Motion for Summary Judgment re: Agreed Issues No. 17A, No. 17B, and No. 17C, Regarding SEPA.
4. Declaration of Patrick Williams, dated August 27, 2007 (***hereinafter "First Williams Decl."***), including Attachment 1 (Declaration of Kevin Brackney, with Attachments 1A & 1B), and Attachments 2-10.
5. Appellants' Motion for Summary Judgment Re: Agreed Issue No. 18A Regarding Jurisdiction Over Constitutional Issues.
6. WSU's Motion for Partial Summary Judgment [re: Issues 1, 2, 5-9, 12-15, and 17].
7. Declaration of Patrick Kevin Brown, dated August 27, 2007 (***hereinafter "First Brown Decl."***), including attached Exhibits 1-10.
8. Declaration of Ann Fulkerson, dated August 27, 2007.
9. Declaration of Thomas Matuszek, dated August 24, 2007, including attached Exhibit 1.
10. Declaration of Terry A. Ryan, dated August 24, 2007, including attached Exhibit 1.
11. Declaration of Sarah E. Mack, dated August 28, 2007, including attached Exhibits 1-6.
12. Declaration of Gary Wells, dated August 28, 2007 (***hereinafter "First Wells Decl"***), including attached Exhibits 1-11.
13. Respondent Department of Ecology's Motion for and Memorandum in Support of Partial Summary Judgment [re: Issues No. 4, 6, 11, 16 and 18A], (as amended by Errata Sheet dated September 11, 2007).
14. Declaration of Alan M. Reichman in Support of Ecology's Motion for Partial Summary Judgment, dated August 27, 2007, including Attached Exhibits 1-4.

15. Declaration of Patrick Kevin Brown in Support of Ecology's Motion for Partial Summary Judgment, dated August 27, 2007 (***hereinafter "Second Brown Decl."***).
16. Declaration of Guy J. Gregory in Support of Ecology's Motion for Partial Summary Judgment, dated August 27, 2007.
17. Declaration of Keith L. Stoffel in Support of Ecology's Motion for Partial Summary Judgment, dated August 27, 2007.
18. Appellants' Response to Motions of Ecology and WSU for Partial Summary Judgment on Issues 1-18A.
19. Declaration of M. Patrick Williams, dated September 10, 2007 (***hereinafter "Second Williams Decl."***), including Attachments 1-5.
20. Declaration of M. Patrick Williams, dated September 11, 2007 (hereinafter ***"Third Williams Decl."***), including Attachment 1.
21. Declaration of Kent Keller, dated September 10, 2007, including Attachments 1-2.
22. Declaration of Rachael Osborn, dated September 10, 2007 (***hereinafter "Second Osborn Decl."***), including Attachments 1-12.
23. Declaration of Scott Cornelius, dated September 10, 2007, including Attachments 1-5.
24. WSU's Partial Joinder in Ecology's Motion for Partial Summary Judgment.
25. WSU's Memorandum in Response to Appellants' Motion for Summary Judgment re: Issues 7, 8D and 9B.
26. WSU's Memorandum in Response to Appellants' Motion for Summary Judgment re: Issue 17 (SEPA).
27. WSU's Memorandum in Opposition to Summary Judgment re: Issue 18.
28. Supplemental Declaration of Gary Wells in Opposition to Appellant's Motion for Summary Judgment, dated September 11, 2007 (***hereinafter "Second Wells Decl."***), including attached Exhibits 1-2.
29. Ecology's Response to Appellants' Motions for Partial Summary Judgment.
30. Ecology's Notice of Joinder in WSU's Motions for Partial Summary Judgment.
31. Response Declaration of Patrick Kevin Brown, dated September 11, 2007 (***hereinafter "Third Brown Decl."***), including attached Exhibit 1.
32. Response Declaration of Victoria Leuba, dated September 11, 2007.
33. Appellants' Reply Brief on Issues of Enlargement, Relinquishment & Abandonment, and Reply to Ecology's Joinder Notice.
34. Appellants' Reply Brief on SEPA Issues 17A, 17B, 17C, dated September 21, 2007.
35. Appellants' Reply Brief on Constitutional Issue 18A.
36. Declaration of M. Patrick Williams in Support of Appellants' Reply to Issue 18A, dated September 21, 2007, (***hereinafter "Fourth Williams Decl."***), including Attachment 1.

37. Ecology's Corrected Reply to WSU's Memorandum in Opposition to Summary Judgment re: Issue 18, dated October 2, 2007 (superceding September 24 brief).
38. Ecology's Reply to Appellants' Response Memorandum.
39. WSU's Reply Memorandum in Support of Summary Judgment.
40. Declaration of Steven Russell in Support of WSU's Motion for Partial Summary Judgment, dated September 24, 2007.
41. Declaration of Terry Boston in Support of WSU's Motion for Partial Summary Judgment, dated September 24, 2007, including attached Exhibits 1-2.
42. Second Supplemental Declaration of Gary Wells in Support of WSU's Motion for Partial Summary Judgment, dated September 21, 2007 (***hereinafter "Third Wells Decl."***), including attached Exhibits 1-2.
43. Appellants' Notice of Additional Legal Authority.

BACKGROUND

In October 2004, WSU submitted applications to Ecology proposing to change/transfer all of its existing groundwater rights currently used to serve its Pullman campus. WSU proposes to integrate the water rights associated with its existing campus well system, by adding seven (7) of its existing wells as authorized points of withdrawal for each of its existing groundwater rights in the area, and changing the place of use for each right to be consistent with its approved water service area. In other words, WSU wished to be able to withdraw water under each of its groundwater rights from any or all of its existing wells. *First Brown Decl.*

The required notice of application was published in the Pullman Daily News on January 14 and 25, 2005, and a subsequent amended notice was published on May 5 and 12, 2005, to correct errors in the first notice. Two protests and one letter of concern were received during the protest period, including one protest on behalf of Appellant Scott Cornelius and one on behalf of Appellant Palouse Water Conservation Network.

Because the cumulative quantities of water for the integration proposal consist of more than 2,250 gallons per minute (gpm), a State Environmental Policy Act (SEPA) analysis was conducted. After review of a completed environmental checklist and other information, WSU issued a final Determination of Non-Significance (DNS) on June 7, 2004. WSU determined the proposal would not have a significant adverse impact on the environment, although the checklist did not specifically discuss the declining water level of the Grande Ronde Aquifer. In reviewing the change applications, Ecology relied on the DNS issued by WSU and did not conduct a new threshold determination or perform supplemental SEPA analysis.

The essential information contained in each of the WSU water right documents at issue in this appeal is summarized as follows:

Water Right Document	Source	Priority Date	Instantaneous Quantity (Qi) Gallons per minute	Annual Quantity (Qa) Acre feet per year	Purpose stated on document
Ground Water Claim 098522	Well - #1	1934	500 gpm	720 afy	Municipal supply, irrigation and stock
Ground Water Claim 098523	Well - #2	1938	500 gpm	720 afy	Municipal supply, irrigation and stock
Ground Water Claim 098524	Well - #3	1946	1000 gpm	1440 afy	Municipal supply, irrigation and stock
Certificate 5070-A	Well - #4	Aug 1, 1962	1500 gpm	2260 afy	Domestic supply for WSU
Certificate 5072-A	Well - #5	May 27, 1963	500 gpm	720 afy	Community domestic supply & stock water
Certificate G3-22065C	Well - #6 Well - #8	Nov 12, 1973	1500 gpm	1600 afy	Municipal supply
Permit G3-28278P	Well - #7	Jan 28, 1987	2500 gpm	2260 afy	Municipal supply

Over the years, the WSU Pullman campus water system has been integrated into two systems, a "low distribution system" served by Wells 1, 3, 4, and 7, and a "high distribution system" served by Wells 5, 6, and 8. *Third Wells Decl., Exh. 1.* As presently operated, the WSU campus water system is integrated or consolidated, in that all the water for the system is

withdrawn primarily from two wells. Water withdrawals from individual wells have not historically matched and do not presently match the quantities authorized under the water rights identified with those wells. In some instances, water has been withdrawn from wells other than the wells with which particular water rights are identified. The system integration has occurred without specific authorization from Ecology or its predecessor agencies. *First Brown Decl. at ¶8.*

As part of its review of the change applications, Ecology applied a number of provisions from the recently enacted Municipal Water Supply Act, commonly referred to as the 2003 Municipal Water Law (2003 MWL).[2] Most notably, Ecology determined that WSU is a "municipal water supplier" under the terms of the 2003 MWL, and that the rights it holds for the Pullman campus qualify as rights for "municipal supply purposes" as that term is defined by the 2003 MWL. In September 2006, Ecology issued Reports of Examination (ROE) for each of the change applications at issue in this appeal, approving, in large part, WSU's change/consolidation requests. Ecology denied integration of Claim No. 098524 (associated with Well No. 3) upon Ecology's tentative determination that this claim is invalid. Appellants timely appealed Ecology's decisions to this Board. WSU does not challenge Ecology's decision regarding the validity of Claim No. 098524. The parties subsequently filed a Statement of Agreed Legal Issues consisting of forty (40) issues, comprising eighteen (18) general topics, presented by Ecology's interpretation of the 2003 MWL and its application to WSU's rights.

These motions and cross motions for partial summary judgment addressing all the issues followed. More specifically, Appellants have moved for summary judgment regarding Issues 7

[2] 2E2SHB 1338, Chapter 5, Laws of 2003 (58th Leg, 1st Spec Session).

(Enlargement), 8D (Relinquishment), 9B (Abandonment), 17A-C (SEPA), and 18A (Constitutional Claims). Respondent WSU has moved for summary judgment in favor of Respondents as to Issues 1 (Municipal Water Supplier), 2A-F (Municipal Water Supply Purposes), 5 (Perfection), 6 (Beneficial Use), 7 (Enlargement), 8A-E (Relinquishment), 9A-F (Abandonment), 12A-F (Impairment to Existing Rights), 13 (Aquifer Depletion), 14 (Public Welfare), 15 (Impairment to Surface Water), and 17A-C (SEPA).[3] Ecology has moved for summary judgment in its favor as to Issues 2 (Municipal Water Supply Purposes), 3 (Reliance on 2003 MWL), 6 (Beneficial Use), 10 (Same Body of Public Ground Water), 11 (Expansion of Place of Use), 16 (Improper Delegation), and 18A (Constitutional Claims).[4]

ANALYSIS

Summary Judgment Standard

Summary judgment is a procedure available to avoid unnecessary trials on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution. The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992).

[3] Ecology joined WSU's motion for summary judgment on each of these issues.
[4] WSU joined Ecology's motion for summary judgment as to issues 2, 3, 6, 10, 11, and 16, but not 18A.

If a moving party meets the initial burden of showing the absence of a material fact, the inquiry shifts to the party with the burden of proof at hearing. The party then must make a showing sufficient to establish that a triable issue exists. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-226, 770 P.2d 182 (1989). In making its responsive showing, the nonmoving party cannot rely on mere allegations, unsubstantiated opinions, or conclusory statements, but must set forth specific facts showing that there is a genuine issue for trial. *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). At that point, we consider the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Id.*

Legal Issues

We address Issue No. 18 first, because arguments concerning the interpretation and constitutionality of certain provisions of the 2003 Municipal Water Law permeate many of the Appellants' legal theories and specific legal issues raised in this appeal. We then address each of the remaining issues in the order presented by the parties' Statement of Agreed Legal Issues.

Legal Issue No. 18: Constitutional Claims.

Two constitutional issues are raised in connection with this appeal; first, whether the Board has jurisdiction to consider the constitutional claims raised in this appeal; and second, whether the application of the 2003 MWL in the water right decisions is contrary to the Washington State and United States Constitutions.

None of the parties suggest this Board is the proper forum to resolve a facial challenge to the constitutionality of the 2003 Municipal Water Law. We agree. However, WSU contends that the Board has jurisdiction to consider the constitutional claims raised in this appeal, including whether application of the 2003 MWL in this case is contrary to the Washington State

or United States Constitutions. Appellants and Respondent Ecology, on the other hand, argue that the Board is without jurisdiction to decide "as applied" constitutional questions raised by application of the 2003 MWL to the facts of this case.

The Board has jurisdiction to hear and decide appeals of Ecology water right change decisions. *RCW 43.21B.110(1).* This jurisdiction necessarily includes the authority to determine whether Ecology's water right change decision complied with applicable laws, including the 2003 MWL. *Weyerhaeuser v. Tacoma-Pierce County Health Dep't.,* PCHB 99-067, 069, 097, 102, COL XXI (Order on Motions to Dismiss, September 23, 1999) (holding that, while the Board did not have jurisdiction to determine the facial constitutionality of a state statute, it did have jurisdiction over whether the challenged permit decision complied with the applicable laws, including the challenged statute).

To the extent that we must interpret the meaning of the 2003 MWL in order to apply it to the facts of this case, we have jurisdiction to do so. In so doing, we start with the presumption that it is constitutional. *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). From that presumption, we attempt to construe it in such a way as to avoid unconstitutionality. *World Wide Web Video v. Tukwila*, 117 Wn.2d 382, 392, 816 P.2d 18 (1991), quoting *State v. Browet, Inc.* as follows: "[w]herever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality." 103 Wn.2d 215, 219, 691 P.2d 571 (1984).

Regardless of how they are labeled by the parties, the constitutional questions raised by the Appellants in this appeal are tantamount to a facial challenge of the statute. The Board would necessarily have to consider the validity of the Legislature's decision to make portions of the 2003 MWL retroactive. The Board does not have jurisdiction over such a facial challenge to the statute. *Methow Valley Irrigation District v. Ecology,* PCHB Nos. 02-071, 074, XLI (Order on Partial Summary Judgment, February 27, 2003); *Tario v. Ecology*, PCHB No. 05-091, COL V

(Order Granting Summary Judgment, March 2, 2006). To that end, Appellants' and Ecology's motions for summary judgment on Issue No. 18A should be granted with respect to any claims amounting to a facial challenge to the constitutionality of the 2003 Municipal Water Law.

Legal Issue No. 1: Municipal Water Supplier.

Legal Issue No. 1 asks whether WSU is a municipal water supplier under chapter 90.03 RCW. A "municipal water supplier" means "an entity that supplies water for municipal water supply purposes." *RCW 90.03.015(3).* Thus, the question of whether WSU is a municipal water supplier turns on whether WSU holds any water rights that qualify for "municipal water supply purposes" as that term is defined in RCW 90.03.015(4). That section defines "municipal water supply purposes" in part, as "a beneficial use of water: (a) For residential purposes through fifteen or more residential service connections or for providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year...."

Respondents assert, and Appellants concede, that "[u]nder today's law, WSU fits within the definition of Municipal Water Supplier set forth in the amended RCW 90.03.015." *Appellants' Response at 11.* Additionally, Appellants concede that Water Right Certificate G3-22065C (associated with Well No. 6) "does appear to be a certificate issued for municipal water supply purposes." *Appellants' Response at 20.* Thus, this right and various other water rights identified as for municipal purposes, and which are used to supply a single integrated campus water system that serves well over fifteen residential service connections, make WSU a "municipal water supplier." We conclude that WSU is a municipal water supplier under Ch.

90.03 RCW and that, as a matter of law, WSU and Ecology are entitled to summary judgment on Legal Issue No. 1.[5]

Legal Issue No. 2: Municipal Water Supply Purposes.

Issue No. 2 pertains to whether the water rights associated with Wells No. 1, 2, 4, 5, 6, and 7 are rights for municipal water supply purposes under chapter 90.03 RCW.

The Legislature has defined "municipal water supply purposes" as follows:

> (4) "Municipal water supply purposes" means a beneficial use of water: (a) for residential purposes though fifteen or more residential service connections or for providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year; (b) for governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district; or (c) indirectly for the purposes in (a) or (b) of this subsection through the delivery of treated or raw water to a public water system for such use. If water is beneficially used under a water right for the purposes listed in (a), (b), or (c) of this subsection, any other beneficial use of water under the right generally associated with the use of water within a municipality is also for "municipal water supply purposes," including, but not limited to, beneficial use for commercial, industrial, irrigation of parks and open spaces, institutional, landscaping, fire flow, water system maintenance and repair, or related purposes. *RCW 90.03.015(4).*

Because the Legislature defined "municipal water supply purposes" in the present tense (*i.e.,* it "means a beneficial use of water…"), we interpret this as requiring present, active compliance with the definition through actual beneficial use of the water at the time a right is being characterized. Thus, we must examine WSU's actual use of water under each right, and whether each right is presently being put to beneficial use for municipal purposes. Application of this test to the rights at issue, used in conjunction with the application of the statutory

[5] The question raised by Appellants regarding whether WSU *was* a municipal water supplier prior to adoption of the 2003 MWL amendments to the Water Code is not squarely before us because it calls into question the retroactive application of the MWL. The Board has declined to address the constitutional claims in this appeal.

definitions, leads to the conclusion that each of the rights at issue is for a municipal water supply purpose.

As we have concluded above, it is undisputed that the WSU campus water system presently includes the requisite number of residential service connections required by RCW 90.03.015(4)(a) for WSU's rights to be eligible to qualify for "municipal water supply purposes" under that statute. WSU contends that by virtue of the integrated nature of the campus water system (in which water from each of its rights and wells enters a unified distribution system serving the campus' residential connections), all the rights are therefore being beneficially used for municipal supply purposes. Ecology asserts that a water right qualifies as being for municipal purposes if it meets the statutory definition under RCW 90.03.015, regardless of the purpose stated on the water right document. *Ecology's Joinder in WSU' Motion for Partial Summary Judgment at 2.*

In analyzing whether each of WSU's water rights constitutes a right for municipal water supply purposes in this appeal, it is necessary to examine not only the language in RCW 90.03.015 but also the language in RCW 90.03.560.[6] As previously noted, RCW 90.03.015(4) specifically sets forth three separate beneficial uses that qualify as municipal water supply purposes. The key portion of this subsection for purposes of this analysis, however, is the language that also includes "any other beneficial use generally associated with the use of water within a municipality" within the meaning of "municipal water supply purposes."

RCW 90.03.560 addresses how Ecology processes changes or amendments to water rights held by a municipal water supplier to ensure that water rights held for municipal water supply purposes are correctly identified. It states, in part:

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[6] RCW 90.03.550 also lists beneficial purposes of use generally associated with a municipality, but none of those listed uses are at issue in this appeal.

> This section authorizes a water right or portion of a water right held or acquired by a municipal water supplier that is for municipal water supply purposes as defined in RCW 90.03.015 to be identified as being a water right for municipal water supply purposes. *However, it does not authorize any other water right or other portion of a right held or acquired by a municipal water supplier to be so identified without the approval of a change or transfer of the right or portion of the right for such a purpose. RCW 90.03.560 (emphasis added).*

Under this statute, the ability of Ecology to characterize a water right held by a municipal water supplier as being for municipal supply purposes is not without limitation. The fact that a municipal water supplier may hold a water right for municipal supply purposes does not automatically convert all water rights held by the municipal water supplier into municipal water rights or water rights for municipal supply purposes. Even if the municipal water supplier subsequently used other water rights for a municipal water supply purpose, RCW 90.03.560 requires a municipal water supplier to use the change process to change the purpose of use for other non-municipal water rights. RCW 90.44.100, which was not amended by the 2003 MWL, also prohibits changes in the purpose of use for groundwater.[7] *R.D. Merrill Co. v. PCHB*, 137 Wn.2d 118, 130, 969 P.2d 458 (1999); *City of West Richland v. Ecology*, 124 Wn. App. 683, 692-93, 103 P.3d 818 (2004). Therefore, if a portion of WSU's groundwater rights cannot be characterized under RCW 90.03.330 as being for municipal supply purposes, WSU is unable to change the purpose of use of these groundwater rights to municipal supply purposes. However, based on the analysis below, the Board concludes that each of the rights before us in this case qualify as a right for municipal water supply purposes, and there has not been a change in purpose of use of all or any portion of such rights.

[7] The Legislature chose to allow unperfected surface water rights for municipal water supply purposes to be changed for any purpose under certain circumstances when it enacted the MWL, but did not provide such broader authority for changes of groundwater rights. *See* RCW 90.03.570.

The Board analyzes each of WSU's water rights to determine if they meet the definition of "municipal supply purposes" contained in RCW 90.03.015(4), either as specifically listed for that purpose, or as a "right generally associated with the use of water within a municipality." In doing so, the Board also looks for guidance to the 2003 Municipal Water Law Intrepretive and Policy Statement adopted by Ecology on February 5, 2007 (POL-2030).[8] *Reichman Decl. Exh. 2.* We conclude each of WSU's water rights individually discloses its intended and actual purpose for municipal water supply under the statutory definition.

As previously noted, Appellants concede that Water Right Certificate G3-22065C (associated with Well No. 6) was issued for and is presently being used for municipal water supply purposes, so as a matter of law, WSU and Ecology are entitled to summary judgment on Legal Issue No. 2E.

It is also undisputed that Certificate 5070-A (associated with Well No. 4) was issued solely for domestic supply of the WSU campus. *First Wells Decl., Exh. 4.* Appellants argue that domestic supply and municipal water supply have historically been treated as separate purposes of use by Ecology. *Second Osborn Decl., Attachments 3, 4.* The Board, however, applies the MWL as written by the Legislature. The Legislature expressly listed residential use of water through 15 or more residential service connections as a municipal supply purpose. The Legislature further recognized domestic supply as a municipal supply purpose for purposes of the MWL by stating that community or multiple domestic water supply provided by a municipal water supplier is limited by the maximum instantaneous quantity and annual quantity rather than the specific number of connections or population. *RCW 90.03.260(4) and (5).* We conclude this

[8] This document also acknowledges that certain water rights held by a municipal water supplier, such as for agricultural irrigation and dairy purposes of use, are not generally for municipal purposes, and cannot be conformed to a municipal water supply purpose of use without an application for a change being filed and approved. *Id. at 2, 11* Agricultural irrigation, under certain circumstances, may constitute a municipal supply purpose for certain governmental entities. *Id. at 6.*

certificate falls squarely within the definition of "municipal water supply purposes" and that its present beneficial use by WSU entitles Respondents to summary judgment as to Legal Issue No. 2C.

When a purpose of use is not generally associated with the use of water within a municipality, such as irrigation or dairy use, Ecology policy recognizes that the purpose of use of these water rights must be evaluated on a case-by-case basis. *Reichman Decl., Exh. 2 (POL-2030) at 2.* In doing so, Ecology considers the entity that was originally issued the water right as well as the current holder of the water right in determining whether a water right qualifies for a governmental purpose. *Id. at 5.*

Four of WSU's water rights documents each list multiple purposes, including municipal or community domestic supply, combined with irrigation and/or stock water (WSU's Claims 098522, 098523, 098524, and Certificate 5072-A). *Wells Decl., Exhibits 1, 2, 3, and 5.* Where a water right includes multiple purposes of use, without apportioning the authorized quantity between/among the different purposes, Ecology at times has concluded that the entire right may properly be characterized as being for any of the listed purposes. *Reichman response to Board question at oral argument.* The Board notes that WSU has always been the holder of the water rights in question and did not acquire them from some other entity. The Board concludes that in this case where a water right includes multiple purposes of use without apportioning the authorized quantity between/among the different purposes, and when one of the listed purposes of use is for either municipal or domestic supply, that the entire right may properly be characterized as being for municipal supply purposes. Each of these four rights identifies a municipal purpose (either "municipal supply" or "community domestic supply"), without apportioning the quantities between/among the other identified purposes. *Id.* Each is presently

being put to beneficial use in support of WSU's institutional activities. Respondents are therefore entitled to summary judgment as to Legal Issues No. 2A, 2B, & 2D.[9]

Finally, Permit G3-28278P (associated with Well No. 7) was issued in 1988 for "continuous municipal supply." *First Williams Decl., Attachment 5 (Original ROE for G3-28278P).* To the extent it was also issued as a "supplemental" alternative source for Claims 098523, 098524 and Certificate 5070-A, which we have concluded are for municipal supply purposes, Respondents are entitled to summary judgment on Issue No. 2F.

Appellants argue that finding WSU's rights to be for municipal supply purposes requires a "retroactive" application of the 2003 MWL, which they object to on constitutional grounds. The Board is required to apply the presumably constitutional language of the statute to the water rights before us. To the extent that using definitions enacted in 2003 to characterize WSU's pre-existing water rights as part of the 2006 change decisions may be viewed as a "retroactive" application of the statute, we note only that we believe use of the definitions under these circumstances was intended. We leave to the Courts the related questions raised by Appellants regarding whether such use constitutes an impermissible retroactive application in violation of the Washington or United States Constitutions.

Legal Issue No. 3: Reliance on Municipal Water Bill.

Legal Issue No. 3 asks whether the MWL excuses consideration and application of any applicable criteria for an application to change a groundwater right. Appellants, who initially raised this issue, questioned Ecology's position that the MWL "affects" but does not excuse consideration of the applicable criteria for groundwater changes. Ecology maintains that the

[9] Claim No. 098524 (associated with Well No. 3) was not included within Issue No. 2.

provisions regarding evaluation of a change or transfer application for a water right must still be met, but the tentative determination of the validity and extent of the water right is affected by RCW 90.03.330.

Appellants specifically question whether Ecology is allowed to disregard a long history of non-use of a water right in assessing whether a water right has been abandoned when making its tentative determination of the validity of a water right. Ecology adopted a policy (POL 1120) on August 30, 2004, which allows for a simplified tentative determination of the validity of a water right when the existing water right is for a municipal water supply purpose, in accordance with RCW 90.03.330(3). *Second Brown Decl., Exh.2* (Policy 1120, "Water Resources Program Policy for Conducting Tentative Determinations of Water Rights"). Under POL 1120, an investigation of the complete history of the water right is not required under a simplified tentative determination. *Id. at 3.* Appellants also urge the Board to recognize that different cases involving transfers may require the consideration of other laws such as SEPA. *Appellants' Response at 22.*

We conclude that the 2003 MWL does not, as a matter of law, excuse consideration and application of any applicable criteria for WSU's change application to its groundwater rights, and that summary judgment should be granted to Respondents on Legal Issue No. 3. The Board also does not find anything in the MWL to indicate that the Legislature intended to change the law regarding abandonment of municipal water supply rights. Abandonment is discussed in more detail later in this opinion. In order to approve a groundwater right change application under RCW 90.44.100, Ecology must make the following conclusions: (1) that the water right is valid for change; (2) that the proposed additional points of withdrawal (groundwater wells) must tap the same body of public groundwater; (3) that there is no enlargement of the water right; (4) that the change will not impair other water rights; and (5) that the change must not be

detrimental to the public welfare.[10] This is the case because Ecology can only approve a change of the water right to the extent it is valid, and because RCW 90.44.100(2) states that groundwater change approvals require "findings as prescribed in the case of an original application."[11] *R.D. Merrill Co. v. Pollution Control Hearings Board,* 137 Wn.2d 118, 131, 969 P.2d 458 (1999). Ecology's determination of whether a right is valid for change may be affected by the application of the MWL, as it was in this case, and as discussed elsewhere in this opinion (Ecology determination of the validity and extent of the groundwater rights for municipal supply purposes based on past beneficial use). The Board also recognizes that depending on the facts and legal issues in a case, other provisions of law may be applicable regarding whether Ecology properly approved a change or transfer of a groundwater right.

Legal Issue No. 4: Application of Municipal Water Bill.

Legal Issue No. 4 asks the Board to decide: "Whether, if Washington State University is deemed a "municipal water supplier" and its water rights are for municipal water supply purposes, Ecology improperly applied the provisions of RCW 90.03.330(3) and (4)."

Appellants allege Ecology misapplied the provisions of the 2003 Municipal Water Law. In response to the summary judgment motion on this issue, however, Appellants now argue the misapplication based on their belief that some of WSU's rights do not qualify as municipal water rights. Appellants contend: "The problem presented in this appeal is not that Ecology improperly applied this provision to a municipal water right, but that Ecology applied it to two certificates [Certificates 5070-A and 5072-A] that do not qualify as municipal water rights."

[10] The availability of water is not reevaluated for a groundwater change application because the availability of water subject to appropriation is determined at the time application is made for the permit. *R.D. Merrill Co, v. PCHB,* 137 Wn.2d 118, 132 (1999).

[11] Findings required for an original application are specified in RCW 90.03.290.

Appellants' Response at 23. Appellants also assert that only one of WSU's water rights, Certificate No. G3-22065C (associated with Well No. 6), appears to facially qualify as a water right certificate issued for municipal purposes based upon system capacity. Appellants contend that none of the other water rights, including WSU's water right claims, are therefore entitled to have their inchoate portion protected under the "right in good standing" language in RCW 90.03.330(3) because that subsection only applies to "pumps and pipes" certificates. Appellants argue that Ecology's finding the other two certificates qualified as rights for municipal water supply purposes thereby improperly validated the unused portions of those rights for future use (per RCW 90.03.330(3)) and wrongly immunized the certificates from past relinquishment and abandonment.

As argued by Appellants, much of Issue No. 4 is really a restatement of Issue No. 2, that is, whether Ecology properly characterized Certificates 5070-A and 5072-A as municipal water supply rights for purposes of applying RCW 90.03.330. Appellants do not challenge Ecology's interpretation of RCW 90.03.330,[12] nor do they present any legal argument to counter Ecology's analysis of how RCW 90.03.330(3) and (4) are to be applied when evaluating changes to municipal water supply rights documented by certificates that authorize inchoate water quantities. Indeed, Appellants concede Ecology properly applied and carried out the provisions of RCW 90.03.330(3) and (4) with respect to Certificate No. G3-22065C.

We have previously concluded in Legal Issue No. 2 that Certificates 5070-A and 5072-A are properly characterized as rights for municipal supply purposes. It is undisputed that Certificates 5070-A and 5072-A were issued prior to September 9, 2003, the date required for

[12] Except to the extent they have not waived their separate claim that RCW 90.03.330 violates the constitution because of its alleged "retroactive" effect on previously issued water rights. Appellants contend that neither the Legislature or Ecology, nor this Board, can rely on a 2003 change in the law to determine that WSU's pre-2003 water rights were immunized from loss for non-use. *Appellants' Response at 11-13, Reply at 14-15.*

RCW 90.03.330(3) to apply to a right. It is also undisputed that a portion of the annual quantities authorized under each certificate remains inchoate.

Appellants dispute Ecology's determination that these two certificates were issued under Ecology's former administrative practice of issuing certificates based on system capacity or "pumps and pipes" because there is no documentation to that effect. The Board finds that there is evidence, however, to support this finding. First, the declaration of Ecology's permit manager for Eastern Washington states that these certificates were issued based upon the policy of system capacity. *First Brown Decl., at 5-6.* In addition, the Permit Applications related to Certificate No. 5070-A (associated with Well No. 4) and Certificate No. 5072-A (associated with Well No. 5) state the current enrollment at WSU as well as the estimated enrollment for WSU in 1970 and 1980. *First Brown Decl., Exh. 3 & 4.* The ROE issued in response to the Permit Application for Certificate No. 5070-A specifically states that the recommended quantity is based on "the anticipated amount required for 15,000 students." *Second Osborn Decl., Attachment 3.* The historical pumping data relied upon by all parties in this proceeding also shows that the quantities authorized in the certificates far exceeded the amount of water that had previously been put to actual beneficial use under the permits.[13] The fact that Ecology considered the current and future enrollment of students at WSU when reviewing the water right applications, and issued the certificates for quantities in excess of what had previously been put to actual beneficial use under the permits, is clearly a capacity-based determination. Having determined that Certificates No. 5070-A and 5072-A were issued for municipal supply purposes pursuant to Ecology's administrative policy of issuing certificates on the basis of system capacity rather than

[13] *E.g.,* The annual volume pumped from Well No. 4 in the year prior to issuance of Certificate 5070-A was 535 acre feet, while the certificate was issued for 2260 acre feet per year. *Ryan Decl., Exh. 1, Matuszek Decl., Exh. 1, Third Wells Decl., Exh. 2.* Similarly, pumping from Well No. 5 never exceeded 228 afy, while the certificate was issued for 720 acy. *Id.*

actual beneficial use, the Board finds that the water rights represented by these certificates are rights in good standing as described in RCW 90.03.330(3). For these reasons, we conclude Ecology's application of RCW 90.03.330 to those certificates was proper. With respect to Claims No. 098522 and 098523, Ecology agrees that RCW 90.03.330(3) does not apply to them because these water rights are not documented by "pumps and pipes" certificates. However, Ecology notes that there is no inchoate water associated with these claims because they have been fully perfected. *First Brown Decl. at ¶18.* [14] Summary judgment should be granted to Respondents with respect to Legal Issue No. 4.

Legal Issue No. 5: Perfection.

Legal Issue No. 5 asks whether any quantity of water authorized for change with regard to Wells No. 1, 2, 4, 5, 6, and 7 is unperfected, and if so, whether Ecology lacks authority to change any of the water rights. The Appellants dispute Ecology's legal authority to change the point of withdrawal of unperfected or inchoate water rights that are documented by certificates or claims. Like Issue No. 4, above, this issue is a challenge to Ecology's application of the 2003 MWL to WSU's various water rights. This argument pertains specifically to Water Right Certificates No. 5070A, 5072-A, G3-22065C, and Water Right Permit No. G3-28278,[15] which have not been put to full beneficial use in the entire annual quantities authorized. See, *ROEs; Matuszek Decl. and Ryan Decl.*

[14] The Board notes that while Ecology has determined that WSU "fully perfected the water rights claimed under Water Right Claim Nos. 098522 and 098523," it has failed to indicate the instantaneous quantity (Qi) that has been perfected by WSU for these claims and the other rights under appeal.

[15] The Board has previously recognized that the water rights associated with Claim 098522 (Well No. 1) and Claim No. 098523 (Well No. 2) are fully perfected.

Both sides cite *R.D. Merrill* in support of their positions. *R.D. Merrill Co. v. Pollution Control Hearings Board*, 137 Wn.2d 118, 969 P.2d 459 (1999). Appellants contend that the Supreme Court's decision in *R.D. Merrill* upholding Ecology's authority to change the point of withdrawal of an unperfected *permit* should be read as a rejection of Ecology's authority to change the point of withdrawal of an unperfected *certificate*.

Ecology and WSU counter that the Supreme Court's holding in *R.D. Merrill* should be read to authorize changes in places of use and points of withdrawal (but not purposes of use) of inchoate groundwater *rights,* irrespective of whether they are represented by a permit or certificate. Respondents argue that Appellants misconstrue *R.D. Merrill* when they contend that the Court held such authority is limited to permits. Instead, Ecology argues that the Court's focus on the statute's inclusion of "permits" was simply to highlight the legislature's intent that *unperfected* rights may be changed to the same degree as *perfected* rights.

First, we note that water rights documented by certificates were not at issue in the *R.D. Merrill* case, nor were water rights for municipal water supply purposes documented by the so-called system capacity or "pumps and pipes" certificates, which is the status of three of the WSU water rights. Clearly, RCW 90.44.100 authorizes changes of points of withdrawal and places of use for inchoate groundwater rights. *R.D Merrill Co.*, 137 Wn.2d at 129-130. However, in this case we are presented with certificates that have inchoate rights associated with them, an issue not before the Court in *R.D. Merrill.* Western water law normally requires actual application of water to beneficial use in order to perfect the right, at which time a certificate issues. System capacity has been rejected as inconsistent with these beneficial use requirements and as a basis

for perfecting a water right. *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 592, 957 P.2d 1241 (1998).

However, in the context of municipal water supply rights, RCW 90.03.330(2) now protects certain municipal water supply rights documented by system capacity certificates from diminishment except in specified situations. This was not the case when the Court decided *Theodoratus*. *Theodoratus,* 135 Wn.2d at 594. Ecology must now assess whether any of the inchoate quantity specified in a water right certificate that was issued based on system capacity remains valid. This assessment arises out of application of RCW 90.03.330(3), which provides that water rights for municipal water supply purposes documented by certificates issued prior to September 9, 2003, with maximum quantities based on system capacity (*i.e.* "pumps and pipes" certificates), are rights in good standing. Thus, under the 2003 MWL, the inchoate portion of these certificates need not have been put to beneficial use, and can continue to be exercised to serve new growth. These inchoate rights are subject to application of the change criteria of RCW 90.44.100, and Ecology is not authorized to revoke or diminish those municipal water supply rights documented by certificates except through the application of those change criteria. Accordingly, the Board holds that under the 2003 MWL, Ecology has the authority to change the point of withdrawal of the unperfected or inchoate portions of water rights documented by certificates. Ecology did so with respect to Certificates No. 5070A, 5072 A and G3-22065C.

Moreover, in *R.D. Merrill*, the Supreme Court addressed a change to an unperfected groundwater right permit, but its decision includes no language expressly limiting its analysis to permits. We find nothing in the decision to support an interpretation of RCW 90.44.100 that

limits changes of inchoate groundwater rights to only those documented by permits. The statute itself draws no distinction between permits and certificates with respect to eligibility for change, allowing amendment of both a *permit* and *certificate* of groundwater right. *RCW 90.44.100.* Where the Supreme Court distinguishes permits from certificates in its decision, it does so only to contrast the most common difference: perfection, noting that "a certificate of groundwater right is issued when a water right is perfected." *R.D. Merrill*, 137 Wn.2d at 129 (internal citations omitted). The *R.D.Merrill* Court simply did not address, or contemplate, certificates authorizing inchoate water quantities such as those at issue in this case and other municipal water right contexts.

That said, we find the Court's reasoning in *R.D. Merrill* applies equally to a valid inchoate water right issued for municipal supply purposes, regardless of whether the right is represented by an unperfected permit, or a claim, or a certificate issued prior to enactment of the 2003 MWL under Ecology's prior system capacity approach. The groundwater change statute allows flexibility in the physical location and means of withdrawal so permit holders can beneficially use the groundwater they are entitled to appropriate, subject to some limitations. *R.D. Merrill,* 137 Wn.2d at 131. The same reasoning applies to facilitating use of the inchoate portions of a groundwater certificate issued for municipal supply purposes. The applicability of the *R.D. Merrill* holding to municipal water supply certificates with inchoate water quantities is further supported by the Court of Appeals' decision in *City of West Richland v. Dep't of Ecology*, 124 Wn.App. 683, 103 P.3d 818 (2004) (holding that RCW 90.44.100 does not authorize changes in purpose of use of inchoate *water rights*, without limitation to permits). The Court has

also subsequently noted that the Legislature has plainly provided that the groundwater change statute (RCW 90.44.100) *does* authorize a change in the place of withdrawal under an *unperfected right,* not distinguishing how that right is expressed, whether by permit, certificate or claim. *Pub. Util. Dist. No. 1 of Pend Oreille County v. Ecology*, 146 Wn.2d 778, 791-792, 51 P.3d 744 (2002) (Sullivan Creek).

Appellants also argue that WSU has not exercised reasonable diligence to perfect the inchoate portion of its water rights. Appellants point to language in *R.D. Merrill,* in which the Supreme Court cautions that even where unperfected permits are transferable, reasonable diligence still applies and that RCW 90.44.100 cannot be used to speculate in water rights. *R.D. Merrill*, 137 Wn.2d at 130-31. Ecology acknowledges that the Legislature intended through the enactment of the MWL that Ecology's issuance of certificates based on system capacity did not take these water rights out of good standing, but that these water right holders would still have to meet such principles as due diligence in project development to keep these rights in good standing. *Ecology's Memorandum in Support of Motion for Partial Summary Judgment at 12.*

Appellants point to the long period of time that has passed since some of WSU's water rights have been issued and their subsequent lack of perfection. Well No. 4, for example, was drilled in 1963, but Certificate No. 5070-A has yet to be put to full use. Ecology's judgment that WSU is exercising good faith and due diligence in exercising its inchoate water rights by developing facilities and increasing the enrollment of students is entitled to deference. *Port of Seattle v. PCHB*, 151 Wn.2d 568, 90 P.3d 659 (2004). Furthermore, WSU has not engaged in marketing of these water rights. *Second Brown Decl. at 3.*

The Supreme Court has stated that reasonable diligence "must depend to a large extent upon the circumstances." *In re Water Rights in Alpowa Creek*, 129 Wash. 9, 14, 224 P. 29 (1924). The "reasonable diligence" requirement is a flexible standard, and the Board believes that flexibility in interpreting it is particularly important with regard to water rights for municipal supply purposes. Jurisdictions grow at uneven rates and need to be able to serve their growing populations. In addition, water conservation by governmental entities might be discouraged by the imposition of rigid timelines for putting water to beneficial use. At the same time, the government entity must be able to grow into the water right at some time in the forseeable future.[16] *City of Ellensburg v. Ecology*, PCHB No. 96-194 (1996). The Board finds in the present case Ecology was within it discretion to determine that WSU is exercising due diligence in putting its water rights to full beneficial use and that WSU's water rights remain in good standing.

We conclude that Respondents' motion for summary judgment on Legal Issue No. 5 should be granted insofar as certificates and claims representing water rights for municipal supply purposes are eligible for change in point of withdrawal to the same extent as water right

[16] The Board notes that Ecology only established a date for putting water to full beneficial use for Permit G3-28278P. *First Wells Decl. Exh. 7.* There is no similar timeline established for perfecting the substantial inchoate portion of WSU's other water rights. RCW 90.03.260, made applicable to groundwater withdrawals by RCW 90.44.060, requires an application for a water right to contain the time for completely putting the water to the proposed use. In *Lake Entiat Lodge, Associated v. Ecology*, PCHB No. 01-025 (Decision by Board Member Jensen, November 27, 2001). Ecology's responsibility to establish a construction schedule for the inchoate portion of the certificate was emphasized. The Board has also recognized that the imposition of a construction schedule is a critical tool to ensure that limited water resources are not delayed from being put to beneficial use for years on end. *Petersen v. Ecology*, PCHB No. 94-265, COL V (1995). The Legislature has provided additional flexibility in fixing construction schedules for municipal supply purposes in RCW 90.03.320. The Appellants have not raised, and the Board does not decide, the issue of whether Ecology must establish a construction schedule for the inchoate portion of WSU's certificated water rights.

permits. The Board finds that WSU has exercised reasonable diligence in perfecting the inchoate portions of its water rights. Having so concluded, it is therefore unnecessary for the Board to resolve the question of whether any quantity of water authorized for change under the challenged claims and certificates is unperfected for purposes of being lawfully transferred.

Legal Issue No. 6: Beneficial Use.

Legal Issue No. 6 asks whether the water rights decisions are contrary to beneficial use requirements. No disputed issues of material fact have been raised regarding the *types* of uses to which WSU is putting its water, which include irrigation water for a golf course. Appellants contend irrigation of the golf course, facilitated by approval of the change applications, fails to satisfy beneficial use requirements.

The Water Code explicitly declares several types of uses as beneficial, including uses for domestic, irrigation, and recreational purposes. *RCW 90.54.020(1)*. The Legislature has also specifically defined "beneficial use" of water to include, among other things "uses for *domestic water, irrigation*, fish, shellfish, game and other aquatic life, *municipal, recreation*, industrial water, generation of electric power, and navigation." *RCW 90.14.031(2)* (emphasis added). We conclude as a matter of law, without commenting on the relative merits of golf as a recreational endeavor, that WSU's use of water for golf course irrigation constitutes a beneficial use of water.

Appellants further contend that WSU's irrigation of its golf course occurs in a wasteful manner contrary to the beneficial use doctrine requirement that an appropriator's use of water must be reasonably efficient. They allege that WSU is currently overwatering and wasting water at the golf course, relying on personal observations, photographs and local climate information to

support their claim. Respondents counter that this evidence is inadequate to defeat summary judgment.

Beneficial use requires that an appropriator's use of water must be reasonably efficient, although absolute efficiency is not required. *Ecology v. Grimes*, 121 Wn.2d 459, 472, 852 P.2d 1044 (1993). In *Grimes*, several factors were relevant to determining the reasonable efficiency of the water systems: local custom, the relative efficiency of water systems in common use, and the costs and benefits of improvements to the water systems, including use of public and private funds to facilitate any improvements. *Id.* at 474.

The facts material to deciding this issue are those related to the "reasonable efficiency" of WSU's water use. By virtue of Respondent's motion for summary judgment, Appellants have the burden to show that a triable issue exists regarding whether WSU's water use is reasonably efficient. Without more, the observations of Mr. Cornelius, who is admittedly not an expert in this area, along with the photographs and temperature data, fail to establish a genuine dispute about the reasonable efficiency of WSU's water use. We agree with Respondents that Appellants' allegations may be more properly evaluated in the context of an enforcement action, which is beyond the purview of this appeal. We conclude summary judgment should be granted to Respondents on Legal Issue No. 6 because the change decisions are not contrary to beneficial use requirements.

Legal Issue No. 7: Enlargement of Rights.

Legal Issue No. 7 asks whether the water right decisions will unlawfully "enlarge" the rights under Claims 098522 and 098523, Certificates 5070-A, 5072-A, and G3-22065C, and Permit G3-28278P.

As a legal principal in water rights law, enlargement prohibits Ecology from authorizing additional wells for a groundwater right if the combined total quantity withdrawn from the original well and any additional well(s) enlarges the right conveyed by the original permit or certificate. *RCW 90.44.100 (2)*. Appellants' motion for summary judgment on this issue is based on two separate theories: the first assumes WSU will increase the quantity of water withdrawals beyond those amounts previously put to beneficial use (*i.e.,* perfected) as a result of approval of the change application; and the second assumes use of water based on the transfer of quantities associated with an invalidated claim. We address each in turn, rejecting Appellants' first theory and finding material facts in dispute that prevent us from reaching summary judgment on their second.

Appellants' seek a ruling from this Board that enlargement of a water right occurs, as a matter of law, whenever a change in the point of withdrawal enables a water right holder to exercise a greater quantity of an existing right than is being exercised at the original point of withdrawal. Appellants argue the approval of WSU's change applications will allow WSU to pump a greater amount of water than it is physically capable of pumping from its existing well locations and configurations, and that this change therefore amounts to an unlawful "enlargement" of WSU's water rights.

It is undisputed that the change/consolidation of WSU's rights will enable WSU to pump more water than it currently withdraws. However, WSU asserts that it could fully exercise its authorized quantities through its current configuration of wells, either by deepening its existing wells or by drilling replacement wells at the original locations as authorized by RCW 90.44.100(3) (which all parties agree can occur without Ecology's approval). Appellants contend it is irrelevant what WSU *could* do under its existing rights because WSU indisputably

will be withdrawing larger quantities of water after approval of the change application. Appellants assert this is sufficient to constitute enlargement of the existing rights.

We conclude, as a matter of law, that enlargement of a water right does not occur by virtue of a change in the point of withdrawal merely because it may result in a water right holder exercising more of a previously, and validly, authorized quantity of water. This is in accord with previous Board decisions. See *Kile v. Ecology*, PCHB No. 96-131, COL V (1997) (holding that where an amendment of a groundwater certificate for second well is authorized for appropriation of no more water than the original well, which had limited production due to drought, "there is no enlargement of the right conveyed by the original certificate.")

In so concluding, we specifically overrule this Board's earlier conclusory statement in *Jellison v. Ecology*, PCHB No. 88-124 (1989) to the contrary (that granting a change in a surface water point of diversion that would allow a water right holder to exercise a greater amount of a previously authorized quantity of water would be to "enlarge" the right). *Jellison v. Ecology*, PCHB No. 88-124, COL V (1989).

Appellants' second theory of enlargement raises the question of whether an *invalid* claim may be used as a basis to award additional quantities at an alternative location. It is undisputed that Ecology tentatively found Claim No. 098524 (associated with Well No. 3) to be invalid and denied its integration with the other rights at the same time it approved the rest of the changes at issue in this appeal. *First Osborn Decl., Attachment 3 (2006 ROE for Claim No. 098524).* It is also undisputed that WSU did not appeal Ecology's denial of the claim.

Permit No. G3-28278 was issued as a "supplemental" water right. The permit was originally issued with language specifying that its quantities were issued "less those amounts appropriated under ground water Cert. 5070-A, and Ground Water Claims 98522 and 98524. Total combined quantity shall not exceed 2500 gallons per minute, 2260 acre-feet per year."

Brackney Decl., Attachment 5 (1988 ROE for Permit No. G3-28278) at 3. The 2006 Report of Examination approving the change application for Permit No. G3-28278 notes this limitation and also indicates Ecology's tentative determination that the quantities associated with Claim No. 098524 are invalid. *First Osborn Decl., Attachment 1 (2006 ROE for Permit No. G3-28278)* at 3.

Appellants interpret the ROE as excluding the annual quantities associated with Claim No. 098524 from the annual quantities authorized under Permit No. G3-28278P and approved as part of the change applications. They also interpret the Permit as incorporating the instantaneous quantities from Claim No. 098524 and argue that inclusion of such quantities constitutes an unlawful enlargement of WSU's water rights. To allow the transfer of any quantity that is based on an invalid claim, Appellants argue, would improperly validate illegal water use.

WSU argues that Appellants mischaracterize the nature of Permit No. G3-28278, misconstrue the legal effect of Ecology's determination that Claim No. 098524 is not a valid water right, and are barred from making a collateral attack on the permit.

This Board has jurisdiction to consider the extent and validity of water rights claims, and to reach tentative determinations regarding the same, when such evaluations are necessary to render a decision implicating those rights. *Madrona Community, Inc., and Kidder v. Ecology and Burkum,* PCHB No. 86-55 (1987) (reviewing Ecology's tentative determination as to the extent and probable validity of an Appellant's claim in evaluating the impact of a water right applicant's proposed diversion on the claimed rights).[17] In this case, it may be necessary to

[17]See also *MacKenzie v. Ecology, PCHB No. 77-70,COL III (1977)* (holding that the details set forth in a statement of claim regarding quantity, acreage, and priority, are not controlling in the Board's de novo proceedings or in court), *PUD No. 1 of Pend Oreille County v. Ecology, PCHB No. 97-177, 98-043, 98-044, Finding XXII (Amended Summary Judgment, October 15, 1998)* ("Ecology, and, by imputation, the PCHB, does have jurisdiction to reach a tentative determination as to the validity of the water rights in order to render a decision under RCW 90.03.380 [regarding the propriety of the change of the surface water right]"), *aff'd 146 Wn.2d 778, 794 (2002)* ("Ecology has authority to tentatively determine whether a water right has been abandoned or relinquished when acting on an application for a change...and the Board may also do so when reviewing action on a change application.")

consider the validity of Claim No. 098524 in order to decide whether Ecology's approval of the change to Permit No. G3-28278 is lawful. In any event, it is necessary to understand the relationship between the two rights, including facts related to overlapping characteristics of the rights, the amount of water embodied in each right and the basis for those amounts, and the original intent of Permit No. G3-28278P with respect to Claim No. 098524.

The language of Permit No. G3-28278 uses the term "supplemental," which Ecology's own policy statement concedes is disfavored due to its "historic ambiguity" and inconsistent use. *Third Brown Decl., Exh. 1 (POL 1040).* The Permit also states that it was issued "less those amounts appropriated under groundwater claims....98524."

Respondents ask us to find that the use of the term "supplemental" in Permit No. G3-28278 was intended to indicate that Well No. 7 provided an "alternate" source of water for WSU, up to 2500 gpm, less instantaneous quantities withdrawn under other water rights, including Claim No. 098524. They assert that a permit which has been explicitly made "supplemental" to (*i.e.,* an alternate source for) existing quantities of claimed water survives intact, even if the "primary" rights upon which the quantities are based are later determined to be invalid.

While WSU concedes the permit was clearly intended to limit WSU's pumping from Well No. 7, it argues there is no evidence Ecology intended a conditional authorization of the water right only to the extent the underlying "primary" rights remain valid. Similarly, Ecology argues "the permit includes no provision stating that any portion of the quantities it authorizes will become unavailable should a later determination be made that the rights documented by Certificate No. 5070-A, Claim No. 098522, or Claim No. 098524 become invalid." *Ecology's Response at 4.* WSU contends the intent and purpose of the permit was to include the quantity of water that WSU and Ecology believed WSU could pump from Well No. 3 (as well as Wells No.

1 and 4), irrespective of the fact that no independent right for Well No. 3 existed apart from the claims for Wells No. 1 and 2.[18]

The Board finds that material facts remain in dispute regarding the relationship between the rights at issue, including facts related to overlapping characteristics of the rights, the amount of water embodied in each right and the basis for those amounts, and the original intent of Permit No. G3-28278P. These factual disputes make a legal conclusion on the issue of enlargement of Permit No. G3-28278P premature. The Board believes, because there are disputed facts, conflicting interpretations of the law, and potentially significant implications for the regulatory scheme involving supplemental water rights, it is appropriate to reserve judgment at this time. Summary judgment should be denied on Legal Issue No. 7 with respect to enlargement of Permit No. G3-28278P. Respondents' motion for summary judgment on Legal Issue No. 7 should be granted with respect to Water Right Claims 098522 and 098523, and Water Right Certificates 5070-A, 5072-A, and G3-22065C.

Legal Issue No. 8: Relinquishment.

To the extent that each of WSU's rights are claimed for, and meet the definition of, "municipal water supply purposes" under Ch. 90.03 RCW, we conclude as a matter of law that they are categorically exempt from relinquishment without respect to non-use or perfection. State law provides the following specific exemption from relinquishment for municipal water supply rights:

[18] It is undisputed Well No. 3 was constructed in 1946. The parties also agree that Well No. 3 was used, after 1945, as an unauthorized point of withdrawal, which allowed WSU to pump at least some (disputed) quantity of water associated with Claims No. 098522 and 098523. The claimed use of Well No. 3 was not prior to 1945 as required by the Claims Registration Act, and therefore Ecology concluded "It does not appear that Claim 98524 represents a valid water right." *First Brown Decl., Exh. 1.*

(2) Notwithstanding any other provision of RCW 90.14.130 through 90.14.180, there shall be no relinquishment of any water right:

...

(d) If such right is claimed for municipal water supply purposes under chapter 90.03 RCW.... *RCW 90.14.140(2)(d).*

For the reasons explained in Legal Issue No. 2, each of WSU's rights qualifies as a right for municipal water supply purposes and, therefore, is exempt from relinquishment by operation of law. We reach this conclusion by interpreting and applying the statutes as they are written, without reaching Appellants' facial challenge to the constitutionality of the 2003 MWL.

Legal Issue No. 9: Abandonment.

Respondents seek judgment as a matter of law that WSU has not abandoned any of its water rights. They point to the fact that, beginning in the 1930's, WSU continued to construct wells capable of supplying the needs of its Pullman campus, expanded its water use, and sought alternative ways to exercise its rights including withdrawal of water associated with certain rights from wells not authorized for those rights.

Appellants also seek summary judgment on Issue 9B with respect to abandonment of Claim No. 098523 (associated with Well No. 2). As to this claim, they argue evidence shows WSU intended to abandon not just Well No. 2 but also the claim associated with the well. As to WSU's other rights, Appellants contend that exercise of the rights via unauthorized points of withdrawal cannot overcome WSU's non-use of its rights from their authorized points of withdrawal. Alternatively, Appellants argue that disputed material facts prevent summary judgment on the remaining rights.

The issue of abandonment of WSU's rights is amendable to summary judgment. Although the parties vigorously contest the legal implications of the facts, the material facts themselves are not in dispute.

Abandonment is a common law doctrine that occurs when there is intentional relinquishment of a water right. *Okanogan Wilderness League, Inc. v. Twisp*, 133 Wn.2d 769, 781, 947 P.2d 732 (1997); *Jensen v. Dep't of Ecology*, 102 Wn.2d 109, 115, 685 P.2d 1068 (1984); *Miller v. Wheeler*, 54 Wash. 429, 435, 103 P. 641 (1909). The burden of proving abandonment rests with the party alleging abandonment. *Okanogan Wilderness League,* 133 Wn.2d at 781. Courts have historically required both intent and an act of voluntary relinquishment, making proof of abandonment difficult. The Washington Supreme Court has indicated a high standard of proof is necessary and "will not lightly decree an abandonment of a property so valuable as that of water in an irrigated region." *Jensen, supra* (quoting *Miller*, 54 Wash. at 435). The intent to abandon is determined with reference to the conduct of the parties. *Jensen, Id.*

Appellants argue that WSU's long period of non-use of Well No. 2 (associated with Claim No. 098523), when combined with statements in WSU's water service plan and made by its primary water system employee, constitute evidence of abandonment of Claim No. 098523. We disagree, both with respect to WSU's intent and its exercise of the right.

Initially we note the important distinction between abandoning a *well* and abandoning a water *right*. While it is undisputed that WSU, in fact, stopped pumping from Well No. 2 by 1977, that alone is not dispositive of any intent to abandon the right associated with the well.[19]

[19] We disagree with Appellants' interpretation of the tables in WSU's 2002 water system plan as an admission by WSU that it had abandoned *Claim* 098523. *First Osborn Decl., Attachment 4, Tables 4.3 and 4.4*. These tables identify Well No. 2 as abandoned but also identify "Existing Water Rights" and "Current Water Right Status" as *including* Claim No. 098523 in the amounts of 500 gpm Maximum Instantaneous Flow Rate and 720 acre-feet Maximum Annual Volume.

Similarly, WSU's undisputed shifting of a portion of its authorized quantities from its authorized wells to other interconnected but unauthorized wells is not evidence of an intent to abandon the rights associated with the original wells. WSU's relevant conduct consists of more than its abandonment of Well No. 2 or any periods of nonuse of other wells. Its intentions are further evidenced by the steps it took after abandoning Well No. 2 and reducing withdrawals from other source wells.

Nonuse alone does not constitute abandonment *per se,* although long periods of nonuse may create a rebuttable presumption of intent to abandon a water right and shift the burden to the holder of the water right to explain reasons of nonuse. *Pend Oreille County PUD,* 146 Wn.2d at 799. *Okanogan Wilderness League*, 133 Wn.2d at 783.

Even where some question may exist about the extent to which quantities exercised under the authorized locations were, in fact, exercised at alternative locations, we find no intent to abandon to the rights. Notably different than the Town of Twisp in the *Okanogan Wilderness League* case, here WSU does not rely solely on its continued existence as a municipality to rebut any presumption of intent to abandon or non-use of its water rights arising from its non-use of certain wells, including Well 2. Unlike the Town of Twisp, which failed to mention or list its prior appurtenant water rights when seeking groundwater certificates several years after ceasing to divert surface water from previously authorized surface water rights, WSU has continuously identified and claimed the rights now challenged by this appeal.

It is undisputed that in 1962, when WSU applied for the right which subsequently became Certificate No. 5070-A, WSU reported each of the three wells (Nos. 1, 2, an 3) used to withdraw water under its pre-Water Code groundwater rights. *First Brown Decl, Exh. 3.* In 1973, when it applied for the right which subsequently became Certificate No. G3-22065C, WSU again reported its pre-1945 groundwater rights together with its permitted rights to Wells

No. 4 and 5. *First Brown Decl., Exh. 4.* In 1974, WSU filed claims identifying the water it was withdrawing from Wells No. 1, 2, and 3. *First Wells Decl., Exh. 1 – 3.* In 1987, WSU applied for a right for Well No. 7, "as a supplemental source of water for the university campus." *First Brown Decl., Exh. 6.* Ecology's Protested ROE for Well No. 7 stated: "Three existing wells, presently on-line, are considered to have a very limited future. It is the expressed intent of WSU to bring the proposed well on-line as a direct substitute for these wells as they eventually decrease in productivity, or fail." *Id.* The Protested ROE issued in 1988 identified each existing groundwater right and claim appurtenant to the WSU campus, and the permit for Well No. 7 was issued "to replace, as necessary, those waters originally authorized or claimed for appropriation from Wells No. 1, 3 and 4." *Id.*

These undisputed actions alone are sufficient to defeat an allegation of abandonment of Claim No. 098523 or any of WSU's other rights. In this respect, we find the facts more similar to those in *Pend Oreille County PUD*, where the Supreme Court concluded, even if it agreed there had been a long period of nonuse, the PUD's continuous and undisputed actions in search of new ways to exercise its rights from 1956 onward "established that it did not intend to abandon its 1907 water right." *Pend Oreille County PUD, 146 Wn.2d* at 799-800.

Having found no intent to abandon its right, it is not necessary for us to evaluate in detail the precise quantities of withdrawals WSU exercised under each right via unauthorized points of withdrawal. It is enough to recognize that taking steps to continue exercising one's water right, whether such actions are authorized or unauthorized, successful or unsuccessful, may be evidence of intent to not abandon a right. To that end, we conclude that, without more, an appropriation is not abandoned by reason of changing a point of withdrawal.

We also note, without condoning unlawful self-help, that WSU's actions changing to unauthorized points of withdrawal allowed WSU to put its water rights to continuous beneficial

use.[20] Since 1962, WSU's total pumpage has never been less than 469,226,064 gallons per year, or 1,440 acre-feet (the maximum amount claimed under its perfected Water Right Claims No. 098522 and 098523). *See Matuszek and Ryan Decl., Exh. 1 at 6-16.* Water Right Certificate No. 5070-A has, to the extent it was partially perfected, been exercised by withdrawal from other University wells in addition to Well No. 4, including Well No. 7. *See Matuszek and Ryan Decl., Exh. 1.* Water Right Certificate No. 5072-A has, to the extent it was partially perfected, been exercised by withdrawal from other wells, including Wells No. 6 and 8. *First Wells Decl. at 3-4.* Water Right Certificate No. G3-22065C has, to the extent it was partially perfected, been exercised by withdrawal from other wells, including Wells No. 7 and 8. *See Matuszek and Ryan Decl., Exh. 1; First Wells Decl.* We find these rights have been exercised continuously, and the water put to beneficial use serving the water supply needs of the WSU Pullman campus.

Legal Issue No. 10: Same Body of Public Groundwater.

In response to Respondents' motion for summary judgment on this issue, Appellants concede they "have no information to suggest the WSU Wells do not tap the same body of groundwater." *Appellant's Response at 37.* In the absence of any genuine dispute regarding the source of groundwater for any of the WSU wells, Respondents' are entitled to summary judgment on Legal Issue No. 10.

Legal Issue No. 11: Expansion of Place of Use.

[20] Ecology Policy recognizes that "in some situations, historic uses associated with water rights have been made in the diversion or use of water without first obtaining authorization for the changes..." and allows for consideration of the beneficial use to be the measure of the right. *First Brown Decl., Exh. 2 (POL 1120) at §7.*

Based on stipulated facts, the now parties agree the water right decisions in this case do not improperly expand the place of use of the WSU water rights. Respondents' are therefore entitled to summary judgment on this issue.

Legal Issues No. 12: Impairment of Existing Rights.

Issue 12 asks the Board to decide whether Ecology's decision approving changes to each of WSU's contested water rights will impair existing uses. WSU and Ecology have moved for summary judgment, arguing that consolidation of WSU's water rights does not authorize any increase in the quantity of water previously authorized under the separate rights. Withdrawals under the change, they allege, will not affect existing rights, the aquifer, or the public welfare any differently than authorized withdrawals under WSU's existing rights.[21] WSU supports Respondents' position with the Declaration of Patrick Devin Brown, the Ecology Environmental Specialist who reviewed the change applications. Mr. Brown concluded that there would be no impairment because the continuous pumping of WSU water rights for many years had resulted in no reported well interference problems. Even with the integration of WSU well operations that has occurred over time, and the resulting concentration of pumping to fewer wells, there have been no reported well interference problems. *First Brown Decl. at ¶31.* Mr. Brown found "no evidence that pumping those [currently authorized] quantities from any one of the wells, as opposed to pumping those quantities from multiple wells, would cause different or greater

[21] WSU proposes to consolidate its water use from its original six wells into two wells, No. 7 and the new Well No. 8 which is located some distance from WSU's existing wells. *Second Williams Decl., Attachment 4 (Map of WSU Well Locations).* WSU is projecting Well No. 8 to account for half of its production, based on the fact that Well No. 8 can produce 2,500 gpm and WSU's claimed right is 5,000 gpm. *First Osborne Decl., Attachment 1 (ROE for G3-28278P, p. 3).*

impacts to water users or to ground water or surface water resources in the Palouse Basin Area." *Id.*

Appellants argue that, in fact, withdrawals under the consolidation will have adverse impacts that are different and greater than withdrawals under existing rights. They offer declarations that assert increased pumping of WSU wells will affect the Cornelius well, and raise factual questions about the results of pump tests by WSU of test wells. They assert that they can show a detrimental effect on the Cornelius well from the consolidation of the WSU wells, and presumed increased pumping of these wells. *Declarations of Keller, Cornelius.* Appellants have presented evidence in this summary judgment proceeding that Well No. 8 is approximately 2.8 miles from Mr. Cornelius' well, and Well No. 7 is approximately 2.9 miles from his well. *Cornelius Decl.* They have also submitted evidence of a strong correlation suggesting that the Cornelius well and the WSU and Ecology test wells are hydraulically connected. *Keller Decl., Attachment 2.* To some extent, Appellants' impairment arguments are based more generally on the declining state of the Grand Rhonde aquifer, and the potential for future exercise of WSU's water rights. They do not assert an immediate effect on the Cornelius well, but suggest it will occur over some unknown period of time.

Changes in points of withdrawals must be analyzed under the same standards as an original application for a new right, which includes an analysis of whether the change will impair existing rights. *RCW 90.44.100, RCW 90.03.290.* Appellants correctly note the Board has held that an approval cannot be granted where there is incomplete information to determine whether the existing rights of others would be impaired. *Andrews v. Ecology*, PCHB No. 97-20 (1997). However, the Board also concluded in *Andrews*, that "impairment does not arise where the effect of the changed right upon other rights is the same as the original right." *Id.* at COL V.

In this case, while the change/consolidation of the subject rights does not *authorize* any greater quantity of withdrawals than is currently available under existing valid rights (with the exception of Claim 098524 addressed in Legal Issue No. 7), we are not persuaded that is the end of the necessary impairment inquiry. Even accepting the conclusion urged by Respondents from *Kile v. Ecology & James* (that "a change in the point of diversion which would affect other rights no differently than if the diversion were made in the certificated amount at the original point of diversion is not impairment"),[22] we must answer the predicate question of whether the change, in fact, will affect existing rights to the same degree or in the same manner as no consolidation of the rights.

We conclude that Appellants have put material facts into dispute on the question of impairment, sufficient to defeat summary judgment. Even assuming the wells all tap the same body of groundwater (as all parties agree and we have concluded in Issue No. 10), and even assuming WSU could withdraw the full amount of its rights from each right's existing authorized point of withdrawal, the physical shifting of the withdrawals from one location to another has the potential to affect existing right holders. It is premature to make a conclusion on this question at summary judgment. Our decision on whether Ecology has properly concluded there is no impairment of existing rights must be informed by the parties putting forward evidence that Ecology either needed more information to make the impairment decision, or that the actual effect of pumping the integrated WSU wells will impair existing rights. The burden is on the Appellants in this regard.[23]

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[22] *Kile v. Ecology & James*, PCHB 96-131, COL VI (1997).

[23] If the evidence at hearing supports Appellants' allegation that the proposed change will, beyond speculation, have a detrimental effect upon a lawful existing well, or a substantial cumulative increase in pumping lift, then a remand to Ecology would be appropriate for its determination of the reasonable or feasible pumping lift that it will protect in existing lawful wells. This would then become the new starting point for determining whether or not the change impairs existing rights. *Pair v. Ecology & Lehn Ranches, Inc.*, PCHB No. 77-189, COL III (1978) ("If however, neither threshold condition is found to exist, there can be no impairment. The burden of proof is on the appellant

That being said, we specifically reject Appellants' theory that impairment results simply because consolidation of the rights may allow WSU to pump more of its authorized rights from a declining source aquifer than is presently possible from its existing wells. Having defeated summary judgment on the impairment issue, Appellants now have the burden at hearing to demonstrate that Ecology's "no impairment" conclusion was in error. To meet this burden, they must demonstrate that existing water right holders such as Mr. Cornelius will be impaired as a result of changing the *location* of the total authorized amount of withdrawals, from the locations authorized in the existing rights to the newly authorized points of withdrawal. This is not the same inquiry as that suggested by the Appellants, either as to whether the change will allow WSU to exercise a greater amount of its authorized quantities from a declining source than it is currently able to, or whether an increase in the aggregate amount of WSU withdrawals will generally contribute to lowering the level of the Grande Ronde Aquifer.

Legal Issue No. 13: Aquifer Depletion

This issue asks the Board to decide whether consolidation of WSU's rights will unlawfully deplete the source aquifer (the Grande Ronde). Respondent WSU moves for summary judgment on this issue, contending that because consolidation of its water rights does not authorize withdrawal of any additional quantities of water, the change affects the source aquifer no differently than the lawful exercise of WSU's existing rights. Appellants assert the

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who has failed to show either of the threshold conditions, thereby failing to prove that issuance of the present permit will impair an existing water right. The permit must therefore issue.") At this point in the proceeding, we conclude Appellants have brought forward sufficient information to put the impairment issue in dispute but have failed to establish, beyond speculation, the threshold conditions that would have required Ecology to determine the reasonable or feasible pumping lift prior to issuing the change approvals.

consolidation will result in an increase in the total quantity of water withdrawn from the Grande Ronde, exceeding the amount WSU exercises under its current configuration of rights/wells.

Withdrawals in the Grande Ronde Aquifer are currently exceeding the recharge rate. *Second Osborn Decl., Attachment 10.* This aggregate increase in pumping, Appellants further argue, will accelerate depletion of the aquifer contrary to the safe sustaining yield requirements of RCW 90.44.130.

RCW 90.44.130 provides, in relevant part:

> As between appropriators of public ground water, the prior appropriator shall as against subsequent appropriators from the same ground water body be entitled to the preferred use of such ground water to the extent of his appropriation and beneficial use, and shall enjoy the right to have any withdrawals by a subsequent appropriator of ground water limited to an amount that with maintain and provide a safe sustaining yield in the amount of the prior appropriation. The department shall have jurisdiction over the withdrawals of ground water and shall administer the ground water rights under the principle just set forth, and it shall have the jurisdiction to limit withdrawals by appropriators of ground water so as to enforce the maintenance of a safe sustaining yield from the ground water body. *RCW 90.44.130.*

Appellants contend this requirement imposes a continuing duty on Ecology to administer groundwater rights to maintain a self sustaining yield, including during evaluation of change applications. Such an evaluation, Appellants suggest, would require Ecology to deny the WSU change applications "to address the problems of overdraft and water mining in aquifers where withdrawals exceed recharge, as is occurring in the Grande Ronde Aquifer." *Appellants' Response at 49-50.*

Ecology interprets this statute to reflect one aspect of the determination it makes as to the availability of water when a water right permit is first issued by the agency. The principle of

"safe sustaining yield" in this statute protects vested groundwater rights against later appropriations, to prohibit "mining" of groundwater resources.[24]

Ecology interprets the requirement to maintain a "safe sustaining yield" as applying only to the evaluation of new water rights and not to changes in existing water rights. RCW 90.44.130 refers to prior appropriators being preferred over subsequent appropriators, and that Ecology has jurisdiction and shall administer groundwater rights under this principle. The Board agrees with Ecology's interpretation of this statute and finds that the "safe sustaining yield" requirement does not apply to a change in a water right. Summary Judgment is granted to Respondent WSU on this issue.

Finally, we note that Appellants concede, legally and practically, WSU could modify or reconstruct its existing wells or construct replacement wells to enable greater withdrawals from the aquifer and full utilization of its existing water rights. *Appellants' Response at 7.* Appellants' arguments regarding aquifer depletion fundamentally challenge the *exercise* of WSU's water rights, not the change or consolidation of them.

Unlike the impairment arguments advanced by Appellants, which necessarily require consideration of the change in the point of withdrawal relative to the location of other right holders, the aquifer depletion argument goes to the heart of the prior appropriation system. Here there is no allegation that exercise of WSU's rights via any configuration authorized by the change would affect the aquifer any differently than full exercise of WSU's rights from its currently authorized well configuration. Again, Appellants' arguments must be rejected on this issue.

[24] See generally, *An Introduction to Washington Water Law,* V:12-13 (Jan. 2000).

Legal Issue No. 14: Detriment to Public Welfare

This issue addresses whether approval of WSU's change applications will harm the public welfare. Under RCW 90.44.100, changes in points of withdrawal must be analyzed under the same standards as an original application, which include the public interest review set out in RCW 90.03.290 (made applicable to groundwater via RCW 90.44.060). Evaluation of the public interest involves a wide range of considerations, and the exercise of discretion by Ecology. Ecology's public interest determinations are accorded due deference and will not be set aside unless shown to be manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Schuh v. Ecology*, 100 Wn.2d 180, 187, 667 P.2d 64 (1983).

Nevertheless, this Board has recognized that public interest and impairment determinations are related, and inadequate impairment analysis may bring into play the public interest criterion. *Black Star Ranch v. Ecology*, PCHB No. 87-19 (1988). In this case, our conclusion that the impairment issue should proceed to hearing necessarily prevents summary judgment on the issue of the public welfare. The issue will be addressed at the completion of hearing.[25]

Legal Issue No. 15: Impairment to Surface Water Right.

The parties have stipulated that the Grande Ronde Aquifer is not hydraulically connected with any surface water body. We therefore conclude that no impairment of surface water rights

[25] This conclusion differs from that contained in the Board's November 1, 2007 letter apprising the parties of the Board's forthcoming opinion.

will occur as a result of the consolidation of WSU's water rights, and Respondents' motion for summary judgment on this issue should be granted.

Legal Issue No. 16: Improper Delegation.

Based on stipulated facts, we conclude that Ecology did not improperly delegate water allocations and management authority to the Palouse Basin Aquifer Committee. Respondents' motion for summary judgment on this issue should be granted.

Legal Issue No. 17: Adequacy of SEPA DNS for Water Right Consolidation.

Issue No. 17 involves three questions related to the State Environmental Policy Act (SEPA), Ch. 43.21C RCW; first, whether Ecology violated SEPA requirements when processing and issuing the water right decisions (17A); second, whether Appellants are time-barred from objecting to the environmental analysis in WSU's Determination of Nonsignificance (DNS) (17B); and third, whether Ecology's reliance on WSU's DNS was sufficient to constitute prima facie compliance with the procedural requirements of SEPA (17C).

Appellants argue that Ecology violated the requirements of the SEPA by relying on the DNS prepared by WSU. Appellants do not challenge the adequacy of the DNS for WSU's decision making purposes, but assert that Ecology should have supplemented the DNS, or prepared a new environmental analysis, when it considered the water right change applications. Appellants assert that the original DNS failed to disclose material, significant, and adverse impacts of increased pumping by WSU on the declining water levels in the Grande Ronde Aquifer. The Appellants' arguments are based on the assumption that but for the well consolidation, WSU would not have been able to pump enough water from existing wells to serve campus needs, including recreational activities.

Appellants rely on WAC 197-11-600(3)(b), which addresses the circumstances under which an agency may not rely on existing SEPA documents. The regulation allows an agency to assume lead agency status when dissatisfied with a DNS, or to prepare new environmental documents when new information (including discovery of misrepresentation or lack of material disclosure) indicates a proposal's probable significant adverse environmental impacts.[26] Appellants note that while the decision to assume lead agency status is discretionary, the decision to prepare a new threshold determination or supplemental EIS is not, if the standard of the SEPA rule is met. Although Appellants admittedly did not object to the original WSU prepared DNS, they assert they are not precluded from challenging Ecology's decision to utilize that DNS, based on these independent SEPA procedural requirements. While a substantial question is presented as to whether or not the Appellants have waived objection to the DNS by their admitted failure to comment on it, the Board will address the merits of the argument on this issue. See, *WAC 197-11-545*.

The governmental agency's determination that an EIS is adequate is entitled to substantial weight. *Citizens v. Klickitat County*, 122 Wn.2d 619, 860 P.2d 3990 (1993). The

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[26] WAC 197-11-600(3) provides:

> Any agency acting on the same proposal shall use an environmental document unchanged, except in the following cases:
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> (a) For DNSs, an agency with jurisdiction is dissatisfied with the DNS, in which case it may assume lead agency status (WAC 197-11-340(2)(e) and 197-11-948).
>
> (b) For DNSs and EISs, preparation of a new threshold determination or supplemental EIS is required if there are:
>
> (i) Substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts (or lack of significant adverse impacts, if a DS is being withdrawn); or
>
> (ii) New information indicating a proposal's probable significant adverse environmental impacts. (This includes discovery of misrepresentation or lack of material disclosure.) A new threshold determination or SEIS is not required if probable significant adverse environmental impacts are covered by the range of alternatives and impacts analyzed in the existing environmental documents.
>
> (c) For EISs, the agency concludes that its written comments on the DEIS warrant additional discussion for purposes of its action than that found in the lead agency's FEIS (in which case the agency may prepare a supplemental EIS at its own expense).

adequacy of an EIS is tested under the "rule of reason." *Id.,* 122 Wn.2d at 633; *Cheney v. Mountlake Terrace,* 87 Wn.2d 338, 552 P.2d 184 (1976). Under this rule, the EIS must present decisionmakers with a "reasonably thorough discussion of the significant aspects of the probable environmental consequences of the agency's decision." *Id.* When reviewing a claim that a supplemental EIS is required, a reviewing court, including the PCHB, applies a clearly erroneous standard of review, and will reverse the SEPA determination only if left with a definite and firm conviction that the agency has made a mistake. *Preserve Our Islands v. Hearings Board*, 133 Wn.App. 503, 539, 137 P.3d 31 (2006). Here, we cannot conclude that Ecology's decision to rely on the existing DNS is clearly erroneous.

The Board concludes that SEPA does not require Ecology to analyze the effects of pumping the consolidated water rights on the Grande Ronde Aquifer through a new threshold determination or supplemental EIS. The change itself does not allow any more water to be withdrawn on an instantaneous or annual basis than is allowed under the existing scheme of water rights. Thus, we can find no need for additional environmental analysis. Appellants are concerned that the consolidation of the water rights to a limited number of more efficient wells will result in development of the inchoate portion of the water rights, and result, in fact, in more water use by WSU, with resulting harm to the aquifer. Even if this were true, it does not translate into the need for supplemental environmental review, when the existing water rights authorize withdrawal of the same amount of water from the aquifer. WSU presently has the right to use an amount of water defined by existing water rights, whether through retrofitting or replacement of existing wells, or through the water rights change process. In either case, the source of the water is the same body of public groundwater, and the affect on the aquifer is unchanged in this regard.

Moreover, we are unpersuaded that there was any misrepresentation or lack of material disclosure at the point Ecology accepted the DNS prepared by WSU. Declining water levels in the aquifer have been well-established for many years, and are the subject of multiple studies and action by Ecology. *See Brackney Decl., Gregory Decl., Mack Decl., Exh. 1 & 2.* There was no "new information" sufficient to trigger any requirement to prepare additional environmental analysis under these facts. Respondents are also correct that even if there were "new" information about the status of the Grande Ronde Aquifer, this water right change does not authorize any increased pumping or total annual withdrawals beyond the amounts currently allowed by existing rights. The Board holds that it was not clearly erroneous for Ecology to conclude that there is not a probable significant adverse environmental impact from the water rights change application. Ecology correctly relied on the DNS prepared by WSU under these circumstances.

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Based on the foregoing analysis, the Board hereby enters the following:

ORDER

1. Summary judgment is GRANTED IN FAVOR OF RESPONDENTS on Legal Issues No. 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 13, 15, 16, and 17.[27]
2. Respondents' motion for summary judgment on Legal Issue No. 7 is GRANTED with respect to Water Right Claims 098522 and 098523, and Water Right Certificates 5070-A, 5072-A, and G3-22065C. Both sides' motions for summary judgment are DENIED with respect to enlargement of Water Right Permit G3-28278P, and this issue is set over for hearing.
3. Respondents' motion for summary judgment on Issues No. 12 (Impairment of existing rights) and 14 (Detriment to Public Welfare) is DENIED. The question of whether approval of the water right changes will impair existing rights or be detrimental to the public welfare will proceed to hearing for further development of the record.
4. Appellants' and Ecology's motions for summary judgment on Issue No. 18A are GRANTED with respect to any claims amounting to a facial challenge to the constitutionality of the 2003 Municipal Water Law.

DATED this 18th day of January 2008.

POLLUTION CONTROL HEARINGS BOARD

Andrea McNamara Doyle, Presiding

Kathleen D. Mix, Chair

See separate Concurrence and Dissent
William H. Lynch

[27] Appellants' motions for summary judgment on Legal Issues No. 7, 8D, 9B and 17A-C are DENIED.